9 2-565

No. _____

SUPREME COURT, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

BAGGEN TUG & BARGE CO., INC., and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

1. Whether an oral maritime contract for the hiring of a vessel may be held unenforceable under a state statute of frauds?

2. Whether a mortgagor under a preferred ship's mortgage may setoff as against a foreclosing trustee valid maritime and oral contract claims which exist against the beneficiary/mortgagee?

3. Whether a preferred ship's mortgage note held by a trustee under a trust agreement (which expressly recognizes the existence of other contracts between the beneficiary and the mortgagor and excludes such contracts from the trust) may be held to constitute an integrated contract, thus invoking the parol evidence rule to bar proof of said other contracts?

4. Whether a choice of laws provision found in a collateral contract (a promissory note executed in favor of trustees to finance construction of a vessel) voids an otherwise enforceable oral maritime charter agreement?

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties are set forth in the caption of the case. However, the following listed companies have an interest in the outcome of the case:

(1) Security Pacific National Bank, successor to Respondent Rainier National Bank; and

(2) Alaska Pulp Corporation, beneficial owner of claim asserted by Rainier National Bank.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES AND RULE 29.1 LIST ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE CASE 2

A. Samson Tug's Oral Maritime Contract 2

B. The Financing Documents 3

C. Breach of Samson Tug's Maritime Contract .. 5

D. Course of Proceedings and Disposition Below 6

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT 8

I. THE LAW OF ADMIRALTY RECOGNIZES AND ENFORCES ORAL MARITIME CONTRACTS 11

II. PAROL EVIDENCE RULE HAS NO APPLICATION IN THIS ACTION 11

III. THE STATUTE OF FRAUDS DOES NOT BAR ENFORCEMENT OF SAMSON TUG'S CONTRACT WITH APC AND DAMAGES FOR BREACH THEREOF AS A SETOFF AGAINST RAINIER 17

CONCLUSION 18

APPENDIX

A. Order of the Court of Appeals Denying Rehearing A-1

TABLE OF CONTENTS – Continued

Page

B. Memorandum Opinion of the Court of Appeals.....A-3

C. Final Judgment of the District Court..... A-9

D. Judgment of the District Court.....A-12

E. Order of the District Court Granting Summary Judgment..... A-14

F. Promissory Note..... A-19

G. Affidavit of Doug Theno.....A-21

H. Trust Agreement.....A-24

I. Affidavit of George Baggen.....A-32

J. Wash. Rev. Code Ann. 19.36.010.....A-46

K. 46 U.S.C. § 802..... A-47

L. 46 U.S.C. § 922..... A-49

TABLE OF AUTHORITIES

Page

CASES

A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493 (9th Cir. 1988) 14

Austin v. Unavco Industries, 705 F.2d 1 (1st Cir. 1983) 15

Carolina Metal Products Corporation v. Larson, 389 F.2d 490 (5th Cir. 1968) 14

Coastal Iron Works, Inc. v. Petty Ray Geophysical, 783 F.2d 577 (5th Cir. 1986) 15

Dann v. Dredge Sandpiper, 222 F. Supp. 838 (D.C. Del. 1963) 17

Federal Deposit Ins. Corp. v. Bank of San Francisco, 817 F.2d 1395 (9th Cir. 1987) 15

Floyd v. Lykes Bros. S.S. Co., Inc., 844 F.2d 1044 (3rd Cir. 1988) 15

Harwin v. Consolidated Grain and Barge Co., 794 F.2d 985 (5th Cir. 1985) 12

In Re William Rakestraw Co., 450 F.2d 6 (9th Cir. 1971) 14

Knapp, Stout, & Co. Company v. McCaffrey, 177 U.S. 638 (1900) 17

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 7, 8, 11, 17

Mayer Boat Works, Inc. v. Bright Marine Basin, Inc., 265 F. Supp. 352 (E.D.N.Y. 1966) 17

Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409 (9th Cir. 1990) 11, 15

TABLE OF AUTHORITIES – Continued

Page

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) 15

Simon v. Intercontinental Transport (ICT) V.B., 882 F.2d 1435 (9th Cir. 1989) 11

Southland Financial Corp. v. O/S Mary Evelyn, 248 F. Supp. 520 (E.D. La. 1965) 15

St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974) 18

Suydam v. Reed Sten House of Washington, 820 F.2d 1506 (9th Cir. 1987) 15

U.S. v. Triple A Mach Shop, Inc., 857 F.2d 579 (9th Cir. 1988) 12

Union Fish Co. v. Erickson, 248 U.S. 308 (1919) 7, 8, 9, 11, 15, 17

STATUTES

Supreme Court Rule 10.1(a) and (c) 10

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1333 2

46 U.S.C. § 802 3

46 U.S.C. § 922 3

46 U.S.C. § 951 2

Wash. Rev. Code Ann. 19.36.010 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

20 Am.Jur.2d, *Counterclaim, Recoupment and Setoff* § 79 at 298 16

Corbin on Contracts, § 594 at 569 15

Restatement (Second) of Agency § 371 .....6, 16

Restatement (Second of Contracts) § 139(1) 8

Restatement (Second) of Trusts § 329 .....6, 16

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, filed April 29, 1992, is unreported pursuant to Ninth Circuit Rule 36-3 and is reprinted in the Petitioners' Appendix, hereinafter ("Pet. App."), at 3. A Petition for Rehearing and a Suggestion for Rehearing *En Banc* was denied by an Order of the Ninth Circuit dated June 29, 1992. (Pet. App. 1.) The District of Alaska's order on summary judgment filed March 30, 1988, is reprinted in Petitioners' Appendix at 14-18. The District Court for the District of Alaska's Judgment, filed July 6, 1988, granting respondent's motion for summary judgment is reprinted in the Petitioners' Appendix at 12 and 13. The District Court for the District of Alaska's Final

Judgment, filed July 19, 1990, granting respondent's motion for Fed. R. Civ. P. 54(b) judgment is reprinted in the Petitioners' appendix at 9 through 11.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered judgment on April 29, 1992. The Ninth Circuit denied a timely petition for rehearing on June 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The original jurisdiction of the United States District Court for the District of Alaska was invoked under 28 U.S.C. § 1333 and under 46 U.S.C. § 951.

STATEMENT OF THE CASE

A. Samson Tug's Oral Maritime Contract. Samson Tug & Barge Co., Inc. and Baggen Tug & Barge Co., Inc. (hereinafter "Samson Tug") were at all times relevant a tug boat company operating in Southeastern Alaska.[1] In 1974, Samson Tug entered into an oral contract with Alaska Pulp Corporation (hereinafter "APC"). During all times relevant to this case, APC was virtually Samson Tug's only customer, accounting for 99% of Samson Tug's business. APC needed the services of a tug larger than any routinely operating in Southeastern Alaska to tow a

[1] Both companies have common ownership. Baggen Tug was formed only to hold title to the vessel involved in this maritime case, the O/S GEORGEANN, and charter the same to Samson Tug, the operating company.

new log barge. APC entered into the following oral contract with Samson Tug:

> (1) Samson Tug would construct a tug for the special purpose of towing APC's log barge;
>
> (2) APC would finance the construction cost; and
>
> (3) APC would thereafter hire the vessel at rates and frequencies sufficient to cover the tug's operating costs, repay the loan, and net a profit.

None of the terms of this agreement were written. Such oral contracts were customary between APC and its contractors. This specific contract was confirmed by APC's former logging Manager, Doug Theno, who testified,

> "I made such agreements on behalf of [APC] only after receiving specific approval from my supervisors."

(Pet. App. 23, Affidavit of Doug Theno.)

B. The Financing Documents. Samson Tug then constructed a 148 ton tug, the O/S GEORGEANN, at a cost exceeding $1.3 million. During the tug's construction, APC presented Samson Tug with a promissory note and security agreement which Samson Tug signed upon the vessel's completion, APC (a Japanese controlled corporation) arranged for Rainier National Bank (hereinafter "Rainier Bank") to hold a preferred ship's mortgage as Trustee for APC.[2]

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[2] As a Japanese corporation, APC is not a "citizen" of the United States within the meaning of 46 U.S.C. §§ 802 and 922

The scope of Rainier Bank's obligations are defined in a Trust Agreement. (Pet. App. 24-31.) Rainier Bank had loaned no money to Samson Tug. Rainier Bank as Trustee functioned solely as a collection agent for APC. The Trust Agreement between APC and Rainier Bank expressly recognized the limited role of Rainier Bank and the Existence of other agreements between APC and Samson Tug which were beyond the scope of the note and mortgage:

> 1.11. The trustee has been notified that there have been other and previous dealings between the debtor [Samson Tug], other parties, and/or [APC]. It is understood and agreed that the trust estate shall be limited to the Note of Debtor and Samson and the First Preferred Ship Mortgage on the Vessel; and any rights granted, or duties imposed, by any other agreements to which Debtor may be a party shall be excluded from the trust.

(Pet. App. 29, Trust Agreement.)

Samson Tug thereafter executed a $1.3 million note and a preferred ship's mortgage on the O/S GEORGEANN in favor of Rainier Bank as Trustee. The note contained a choice of laws provision:

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and is not eligible to hold a mortgage upon a vessel of the United States.

> "This contract shall be construed in all respects and enforced according to the laws of the State of Washington."

(Pet. App. 20.)

C. Breach of Samson Tug's Maritime Contract. After the O/S GEORGEANN was put into service, APC failed to utilize the vessel at the rates and frequencies necessary to cover operating costs, repay the loan, and allow a profit as agreed. APC's accountants and Woods Division managers collected and analyzed Samson Tug's costs and then recommended appropriate towing rates. APC's higher management would not approve these proposals from its staff and instead held towing rates at a low level which caused Samson Tug to operate at a loss.[3]

Samson Tug made repeated requests for equitable towing rates, so that it could cover expenses and net a profit as promised. APC made various modifications in the payments, always assuring Samson Tug that the new rates or methods would prove equitable. APC's mid-level employees, however, knew this was not the case. APC's

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[3] The rate problem was not fully apparent to Samson Tug because of APC's system of payment which made it very difficult to compare towing revenues with associated costs. Samson Tug was paid based on the total volume or "scale" of the timber it transported for APC. Individual logs or bundles or rafts of logs were typically moved from tidewater logging camps to various log ponds or storage areas and thence to APC's mill where the logs were finally "scaled" for final payment immediately before they were consumed. This process could take years with logs sorted and divided into different rafts and towed to different storage areas in the process. Samson Tug would generally receive a partial payment based on estimated log value and then wait as long as two years for final payment.

logging manager, Mr. Soukup, who collected Samson Tug's costs and then developed equitable proposed rates which were rejected by management stated:

> "The rate schedule ultimately utilized by [APC] did not fairly compensate Samson and would in my opinion cause Samson Tug to provide towing services at a loss."

Samson Tug had been profitable with steadily increasing retained earnings from 1970 through 1975. After the O/S GEORGEANN was placed in service, however, losses occurred from 1976 to 1983, which drained the capital reserves of the company. From 1976 to 1983, the retained earnings of Samson Tug declined from $887,000 to negative $287,000. (Pet. App. 41-42, George Baggen's Affidavit.)

In 1982, APC ceased utilizing Samson Tug for towing services. Samson Tug thereafter ceased payments on the $1.3 million note. Rainier Bank as Trustee then commenced a vessel foreclosure action seeking recovery of $758,000 allegedly due.

D. Course of Proceedings and Disposition Below. In the proceedings below, Samson Tug attempted to defend Rainier Bank's foreclosure action by setting off claims Samson Tug had against Rainier Bank's beneficiary and principal, APC.[4] Those claims included breach of APC's agreement to employ the O/S GEORGEANN at the rates and frequencies promised.

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[4] Rainier Bank has conceded in this action that it functions both as trustee and agent for APC. The *Restatement (Second) of Agency* § 371 and *Restatement (Second) of Trusts* § 329 allows such a setoff in defense of a claim brought by an agent or trustee.

Samson Tug maintained that its maritime contract with APC was valid and enforceable under *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919). Samson Tug pointed out that the financing documents did not integrate the entire maritime contract, but rather specifically excluded such agreement under Trust Agreement clause 1.11 set out Pet. App. 29.

The trial court dismissed Samson Tug's claims of setoff on summary judgment, holding (1) that the choice of laws provision in the promissory note required application of Washington law to Samson Tug's claims for breach of contract by the principal/beneficiary, APC, and (2) that the Washington statute of frauds (Wash. Rev. Code Ann. 19.36.010) prevented enforcement of Samson Tug's oral contract with APC, and (3) the parol evidence rule as applied in Washington prevented proof of the terms of the APC contract. (Pet. App. 16-17.)

On appeal, the Ninth Circuit affirmed in a Memorandum opinion holding:

> "[O]n the facts alleged, the oral contract is not sufficiently independent of the obligation to repay embodied in these documents to avoid the bar on parol evidence."

(Pet. App. 7, Memorandum at 5.)

The opinion concluded that the financing documents between Samson Tug and Rainier Bank were a complete integration of the other agreements between Samson Tug and APC without discussing Trust Agreement clause 1.11 which limited the scope of Rainier Bank's duties to the financing documents and specifically excluded other

agreements between Samson Tug and APC. The Court of Appeals held that the choice of laws provision found in Samson Tug's note payable to Rainier Bank required the Samson Tug/APC maritime contract to be subject to Washington law. The Court of Appeals then applied Washington state law to (1) exclude proof of the oral maritime contract under the parol evidence rule and (2) bar enforcement of this contract under the Washington statute of frauds.[5] (Pet. App. 6, 7)

Samson Tug filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc which was denied. (Pet. App. 1, 2).

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

This Court has long established admiralty precedent for enforcement of oral maritime contracts notwithstanding a challenge based upon a state statute of frauds. *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919). The continuing vitality of the *Union Fish* decision has been confirmed in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

The Ninth Circuit's opinion overlooks these well developed policies. The decision prevents Samson Tug

[5] The Ninth Circuit's opinion did not discuss the Washington statute of frauds, but necessarily relied upon it in ruling that the doctrine of promissory estoppel did not assist Samson Tug as Washington had not recognized the rule set out in *Restatement (Second) of Contracts* § 139(1). Wherein promissory estoppel operates to prevent assertion of the statue of frauds in appropriate circumstances. (Pet. App. 6, 7.)

from enforcing its oral maritime contract for hire of a vessel (confirmed by APC's former employees) on the basis that one facet of that contract relating to initial financing of vessel construction was reduced to writing. The decision below concluded that this writing integrated the prior oral contract. The decision below did not discuss the non-integration clause (Trust Agreement 1.11) specifically excluding from the written financing agreements any other agreements.

APC agreed to employ *and* finance the initial construction of a tug to be owned by Samson Tug. APC thereafter arranged to have the note and a ship's mortgage held by Rainier Bank as trustee (because APC as a foreign corporation was barred from holding such an interest directly). APC then breached its contract to employ the vessel, while enforcing through its trustee Samson Tug's obligation to pay the debt. The decision on appeal prevents Samson from exercising its well established right to setoff against said debt the damages suffered by Samson Tug caused by the breach of the maritime contract. This Court should grant this petition for writ of certiorari to maintain the uniformity of its decisions respecting enforceability of oral maritime contracts, *Union Fish Co. v. Erickson, supra,* and the supremacy of admiralty law when interpreting and enforcing such contracts. This petition should be granted to correct a material mistake of fact in the decision which concluded without analysis that the parties intended to integrate their entire oral agreement for charter of a vessel in documents limited to initial financing of a vessel, which very documents limit the written agreement to the note

and first preferred ship's mortgage and expressly recognize and exclude any other agreements to which the debtor may be a party.

The Ninth Circuit's decision incorrectly allowed a choice of laws clause in a non-integrated and collateral financing document to bar enforcement of an oral maritime contract for the hire of a vessel. The decision below would countenance disregard of oral maritime agreements whenever a collateral non-integrated contract selects state law.

Maritime commerce would be seriously affected if admitted oral agreements are disregarded. The Ninth Circuit's decision allows this result. APC has obtained the benefit of Samson Tug's performance of an oral contract its employees made and has strictly enforced through its trustee, Rainier Bank, Samson Tug's financial obligations, but has avoided its own responsibilities to hire the vessel.

Supreme Court Rule 10.1(a) and (c) states as reasons for review:

> (a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision,
>
> * * *
>
> (c) When . . . a United States court of appeals . . . has decided a federal question in a way which conflicts with applicable decisions of this Court.

Both considerations strongly support granting this Petition for a Writ of Certiorari.

I. THE LAW OF ADMIRALTY RECOGNIZES AND ENFORCES ORAL MARITIME CONTRACTS.

The U.S. Supreme Court recognizes the enforceability of oral maritime contracts. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). This Court affirming a decision of the Ninth Circuit also recognizes that oral maritime contracts may be enforced notwithstanding a conflicting state statute of frauds. *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919). Admiralty jurisdiction extends to claims that arise from a contract if the subject matter of the contract is maritime in nature. *Simon v. Intercontinental Transport (ICT) V.B.*, 882 F.2d 1435 (9th Cir. 1989). State laws which conflict with federal admiralty laws cannot be enforced. *Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409 (9th Cir. 1990). Accordingly, Samson Tug's oral contract with APC respecting the chartering of a vessel is enforceable under the law of admiralty. The Court of Appeals thus erred in barring enforcement of said agreement by invoking the parol evidence rule.

II. PAROL EVIDENCE RULE HAS NO APPLICATION IN THIS ACTION.

In admiralty law the parol evidence rule is generally stated as follows:

> When two parties have made a contract and have expressed it in a writing to which they have both asserted as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings or negotiations will not be admitted for the

> purpose of varying or contradicting the writing. [cit.om.]

Harwin v. Consolidated Grain and Barge Co., 794 F.2d 985 (5th Cir. 1985).

There is no basis here for concluding that the parties assert the financial documents as a complete and accurate integration of the contract to employ a vessel. To the contrary, the trust agreement between APC and Rainier Bank expressly limits the trust to the note of the debtor and the first preferred ship's mortgage and expressly excludes from the scope of the writings the other agreements between Samson and APC.

> 1.11. The Trustee has been notified that there may have been other and previous dealings between the debtor, other parties, and/or [APC]. It is understood and agreed that the trust estate shall be limited to the note of debtor and Samson and the first preferred ship's mortgage on the vessel and any rights granted, or duties imposed, by any other agreements to which the debtor may be a party shall be excluded from the trust.

(Pet. App. 29, Trust Agreement.)

The record thus shows that the parties did not intend to integrate their antecedent oral agreements into a later writing limited to a note and preferred ship's mortgage. In these circumstances, as the Ninth Circuit has previously recognized in *U.S. v. Triple A Mach Shop, Inc.*, 857 F.2d 579 (9th Cir. 1988):

> Evidence of a collateral agreement may be admitted if (1) it does not contradict a clear and unambiguous provision of a written agreement,

> and (2) the parties did not intend the written agreement to be a complete and exclusive statement of their agreement.

Id. at 585.

APC's agreement to employ Samson's vessel at rates and frequencies sufficient to cover operating expenses, retire the debt, and net a profit does not contradict any term of the financing documents. Additionally, as the trust document itself makes clear, the parties did not intend the financial documentation to be a complete and exclusive statement of their agreement.

The Memorandum Opinion misapprehended the record and the facts when it stated:

> In its attempt to prevail on this appeal, appellant contends that the oral agreement on which it relies represents an entirely different transaction from the one memorialized by the promissory note, mortgage, loan agreement and trust agreement. Yet the written instruments on their face represent the parties understanding of how the very transaction that was the subject of the alleged oral contract was to be implemented. On the facts alleged, the oral contract is not sufficiently independent of the obligation to repay embodied in these documents to avoid the bar on parol evidence.

(Pet. App. 7.)

Contrary to this conclusion, the written financial agreements implemented only a part of the oral agreement *and expressly preserved all other agreements.* (Pet. App. 29, Trust Agreement 1.11.) The panel thus misapprehended the relationship between the oral agreement

entered between APC and Samson and a single facet of that agreement later reduced to a writing involving Rainier as trustee. Samson does not seek to vary or contradict those terms which have been set forth in the written financing documents. Samson is, however, entitled to prove the existence and breach of an oral contract to employ its vessel and is entitled under the law of agency and trust to setoff damages for such breach in this action.

The writings between Samson and Rainier evidence only one aspect of extensive and long-term dealings and agreements between Samson and APC. There has been no finding that either APC or Samson intended the writings between Samson and APC's agent, Rainier, to be a complete statement of the relationship between Samson and APC. Such a finding is a prerequisite to application of the parol evidence rule. *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493 (9th Cir. 1988), *In Re William Rakestraw Co.*, 450 F.2d 6 (9th Cir. 1971).

> The chief and most satisfactory index t determine the intent of the parties to an agreement as to whether they intended their written contract to be a complete and final statement of the whole transaction is whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing.

Carolina Metal Products Corporation v. Larson, 389 F.2d 490, 492-93 (5th Cir. 1968).

The Ninth Circuit has characterized the writings as a complete expression of the maritime oral charter contract, although the writings make no mention of it and despite the fact that the court has not articulated a finding that

the parties so intended. The Court of Appeals has found that the oral charter contract is not sufficiently independent of the writings.

> It is not necessary to call it a separate contract, in order to escape the supposed prohibition of the 'parol evidence rule,' if it is, at least, a separate promise, not inconsistent with the writing, and one which reasonable men might readily omit.

Corbin on Contracts, § 594 at 569.

In a maritime case, where the law of admiralty has been developed, it shall not be displaced by conflicting state law. *Floyd v. Lykes Bros. S.S. Co., Inc.*, 844 F.2d 1044 (3rd Cir. 1988), *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577 (5th Cir. 1986), *Pacific Merchant Shipping Ass'n v. Aubry*, 709 F. Supp. 1516 (C.D. Cal. 1989). Where admiralty has no established rule, however, state law may be appropriately applied. *Suydam v. Reed Sten House of Washington*, 820 F.2d 1506 (9th Cir. 1987). While state law may supplement admiralty law, it may not contradict it. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), *Austin v. Unavco Industries*, 705 F.2d 1 (1st Cir. 1983). In the absence of a rule in a matter clearly within admiralty, the court shall fashion federal common law and may refer to state law and uniform codes when doing so. *Federal Deposit Ins. Corp. v. Bank of San Francisco*, 817 F.2d 1395 (9th Cir. 1987), *Southland Financial Corp. v. O/S Mary Evelyn*, 248 F. Supp. 520 (E.D. La. 1965).

Here the admiralty rule is clear. An oral contract for the employment of a vessel is enforceable. *Union Fish, supra*. Samson Tug has shown the existence of such a

contract, its terms and its breach. Samson Tug is entitled under the law to setoff resulting damages against Rainier Bank.

Rainier is both an *agent* of and a *trustee* for Alaska Pulp Corp. When a principal litigates through an agent, a defendant may setoff claims he has against the principal. *Restatement (Second) of Agency* § 371. Similarly, under the law of trust, a defendant may setoff claims against the beneficiary. *Restatement (Second) of Trusts* § 329. In addition, such claims are valid counterclaims against the real party in interest even if such party is not of record.

> If an action is brought on a promissory note transferred to plaintiff but in which he has no beneficial interest, defendant may maintain a counterclaim against the person who is the beneficial owner of such note. It is not requisite that the name of the real party in interest appear in the record, since this may be shown by oral evidence, and when established, a setoff follows with the same effect as if the adverse party had been disclosed by recitals in the record . . . In an action by or against a trustee, defendant may setoff a debt due to or from the cestui que trust . . . The general rule that an equitable right to a setoff of a claim of one person and a claim of his debtor against another will not be judicially recognized is subject to the limitation that an equitable setoff may be allowed against the real party in interest to a demand, although he is not a nominal party.

20 Am.Jur.2d, *Counterclaim, Recoupment and Setoff* § 79 at 298.

III. THE STATUTE OF FRAUDS DOES NOT BAR ENFORCEMENT OF SAMSON TUG'S CONTRACT WITH APC AND DAMAGES FOR BREACH THEREOF AS A SETOFF AGAINST RAINIER.

The record establishes an oral agreement under which Samson would construct an ocean-going tug to APC's requirements with APC to finance and subsequently employ the tug for a term exceeding one year at rates sufficient to retire the debt and net a profit. Samson has also shown evidence that APC breached this agreement.

The Samson/APC agreement constitutes a contract for hire of a vessel. Its maritime nature requires the application of the law of admiralty. *Dann v. Dredge Sandpiper,* 222 F. Supp. 838 (D.C. Del. 1963), *Knapp, Stout, & Co. Company v. McCaffrey,* 177 U.S. 638 (1900). If this is done, the agreement for hire, although oral, is fully enforceable.

Under the law of admiralty, this oral contract is enforceable in the face of a state statute of frauds. *Mayer Boat Works, Inc. v. Bright Marine Basin, Inc.,* 265 F. Supp. 352 (E.D.N.Y. 1966), *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919). In *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961), this Court noted:

> For it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law.[4]

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[4] Although the question has not often been litigated, [cit.om.] it is well accepted that maritime contracts do not as a generality depend on writing for their validity.

* * *

> Writing of a different sort of contract, an equally distinguished British admiralty judge has said that " . . . it is common practice for commercial men to assume very extensive financial obligations on the nod of a head or the initialing of a slip, and many binding chartering engagements are no doubt daily concluded in an informal manner. . . . "

Id. at 734.

Contrary state law may not be applied by a federal court sitting in admiralty to prejudice a characteristic feature of maritime law. *St. Hilaire Moye v. Henderson,* 496 F.2d 973 (8th Cir. 1974), *cert. denied,* 419 U.S. 884 (1974).

CONCLUSION

Rainier Bank has maintained throughout the proceedings below that all that is at issue is a simple enforcement of a ship's mortgage and note. Rainier has successfully obtained a full judgment on that note and foreclosed the mortgage.

Throughout these proceedings, Samson Tug has urged that it may obtain a setoff based on APC's breach of contract and resulting damages. Although Rainier Bank is litigating for the benefit of and subject to the control of its principal/beneficiary APC, Samson Tug's claims have been disregarded.

In a summary judgment context, the Court must view Samson Tug's evidence favorably. By any standard, the

evidence produced by Samson Tug is compelling. That evidence is essentially unrebutted and establishes genuine issues of material fact such that summary judgment should not be granted.

Samson Tug has shown facts establishing a contract with Rainier Bank's principal/beneficiary which required Samson Tug to build the O/S GEORGEANN with a loan from APC for employment by APC at rates sufficient to cover operating cost, debt retirement, and net a profit. This contract is confirmed by APC's former logging manager who made the promise. The subsequent breach of contract is confirmed by former APC employees who tried to set fair towing rates, but who were overruled. After APC broke its promise to Samson Tug, it instructed Rainier Bank to foreclose the mortgage. The simple outrage of such conduct cannot be amplified. It was and is wrong, and this Court should correct this injustice.

For all the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,

WILLIAM G. ROYCE
Counsel of Record
1029 W. Third Ave., Suite 510
Anchorage, Alaska 99501
(907) 279-6595

Attorney for Petitioners

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINIER NATIONAL BANK, a national banking association with principal place of business in the State of Washington, as Trustee, Plaintiff-Appellee, v. O/S GEORGEANN, Official No. 567631, her engines, boilers, etc., Defendant, and BAGGEN TUG & BARGE CO., INC., an Alaska corporation; SAMSON TUG & BARGE CO., INC., and Alaska corporation, Defendants-Appellants.	No. 90-35626 D.C. No. CV-85-064-AJK
BAGGEN TUG & BARGE CO., INC.; SAMSON TUG & BARGE CO., INC., Plaintiffs-Appellants, v. RAINIER NATIONAL BANK, Defendant-Appellee, and LEONARD T. CAMPBELL; CAMPBELL TOWING CO., INC., Defendants.	No. 91-35284 D.C. No. CV-A88-279-AJK (District of Alaska) ORDER (Filed June 29, 1992)

Before: GOODWIN, SCHROEDER, and LEAVY, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINIER NATIONAL BANK, a national banking association with principal place of business in the State of Washington, as Trustee, Plaintiff-Appellee, v. O/S GEORGEANN, Official No. 567631, her engines, boilers, etc., Defendant, and BAGGEN TUG & BARGE CO., INC., an Alaska corporation; SAMSON TUG & BARGE CO., INC., and Alaska corporation, Defendants-Appellants.	No. 90-35626 D.C. No. CV-85-064-AJK
BAGGEN TUG & BARGE CO., INC.; SAMSON TUG & BARGE CO., INC., Plaintiffs-Appellants, v. RAINIER NATIONAL BANK, Defendant-Appellee, and LEONARD T. CAMPBELL; CAMPBELL TOWING CO., INC., Defendants.	No. 91-35284 D.C. No. CV-A88-279-AJK MEMORAN-DUM* (Filed April 29, 1992)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeals from the United States District Court
for the District of Alaska
Andrew Kleinfeld, District Judge, Presiding
Argued and Submitted April 15, 1992
San Francisco, California

Before: GOODWIN, SCHROEDER, and LEAVY, Circuit Judges.

In *Rainier National Bank v. O/S Georgeann and Baggen Tug & Barge*, No. 90-35626 (the "Foreclosure Case"), plaintiff-appellee Rainier National Bank, holder of a promissory note secured by a First Preferred Ship Mortgage on the tug O/S Georgeann, sued defendants-appellants Baggan Tug & Barge and Samson Tug & Barge to collect on the note and to foreclose on the mortgage. Appellants asserted defenses, claimed a setoff and sought affirmative relief all based on claims against a non-party, Alaska Pulp Company, the beneficiary for whom the Bank held the note and mortgage as trustee. The district court rejected these defenses and granted the Bank's motion for summary judgment. The court ordered the arrest and sale of the tug and ultimately entered a deficiency judgment against the appellant.

Following the arrest of the tug, the district court ordered it transferred from the custody of the U.S. Marshals to a substitute custodian, Campbell Towing, nominated by the Bank. Appellants did not oppose the move. The tug allegedly suffered serious damage while in Campbell's possession and appellants sued the Bank as well as Campbell to recover some of the value lost. The district court granted summary judgment in favor of the Bank and the former tug owners appealed. *Baggen Tug & Barge*

Co. v. Rainier Nat'l Bank, No. 91-35284 (the "Custody Case"). The two cases have now been consolidated.

In the Foreclosure Case, the appellants ask us to review the deficiency judgment. Appellee Rainier Bank initially challenges our jurisdiction, claiming that appellants should have perfected a timely appeal from the decree of foreclosure and order of arrest and sale. The appellants state that they do not seek to set aside the sale of the vessel but challenge the amount of the deficiency judgment. They claim that they are entitled to set off against that judgment amounts owed to them by APC under the terms of a 1974 oral agreement between appellants and APC. We conclude that, because a timely appeal was perfected from the deficiency judgment, we have jurisdiction to review that judgment, though not the previously accomplished foreclosure and sale.

According to appellants, Samson Tug & Barge Company in 1974 agreed with Alaska Pulp Company that Samson would build an ocean-going tug and that APC would loan the construction funds to Samson at no interest. The loan was to be repaid by Samson out of the proceeds of Samson's employment by APC, which was to be at rates sufficient to provide for the operating costs of the tug, debt retirement and a net profit to Samson. The terms of the original agreement were oral, and for purposes of this summary judgment review, we assume the appellants' contentions with respect to it are true.

Appellants' principal contention in this appeal is that APC breached the terms of the oral agreement by ceasing to employ the tug. As a result, appellants were unable to repay the loan. They seek to set off their claimed loss of

revenue as a result of the breach against the deficiency judgment entered following their default.

The difficulty with the appellants' position is that in August of 1975, Rainier Bank, APC and appellants each entered into a written contractual arrangement pursuant to which appellants agreed to repay the loan at ten percent annual interest rate to Rainier Bank. The loan was to be secured by a mortgage which the bank held (together with appellants' promissory note) as trustee for APC. APC as a non-citizen could not itself be a holder of a first preferred ship mortgage under the Ship Mortgage Act, 46 U.S.C. §§ 911-84 (West 1974), *repealed*, Pub. L. No. 100-710 § 106(b)(2), Nov. 23, 1988. These documents are silent as to any conditions on loan repayment or duty on APC's part to employ the tug.

The promissory note, which was a part of that overall contractual arrangement, expressly provided that "[t]his contract is to be construed in all respects and enforced according to the laws of the State of Washington." Under Washington law, parol evidence cannot be utilized to alter or add to the provisions of a written agreement such as the one executed by the parties in this case. *Swanson v. Liquid Air Corp.*, 118 Wash. 2d 512 (1992) ("[E]xtrinsic evidence is not admissible to subtract from, vary, or contradict written contracts which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake."). Nor can the provisions of a written contract be avoided by promissory estoppel since Washington does not recognize the rule set out in Restatement (Second) of Contracts § 139(1). *See Family Medical Bldg., Inc. v. Washington State Dept. of Social & Health Serv.*, 104 Wash. 2d 105, 702 P.2d 459, 462-63 (1985). Because the written

contract contains the express provision that it is to be construed pursuant to Washington law, appellants may not now vary, add to or contradict that contract based upon oral understandings.

In its attempt to prevail in this appeal, appellant contends that the oral agreement on which it relies represents an entirely different transaction from the one memorialized by the promissory note, mortgage, loan agreement and trust agreement. Yet the written instruments on their face represent the parties' understanding of how the very transaction that was the subject of the alleged oral contract was to be implemented. On the facts alleged, the oral contract is not sufficiently independent of the obligation to repay embodied in these documents to avoid the bar on parol evidence.

Appellants also contend that the written contract is invalid because they were forced to enter into it under duress. The facts alleged, however, prove no more than that appellants may have been in an inferior bargaining position, not that they were forced or coerced by the acts of APC to contract against their will. *Cf. Puget Sound Power & Light Company v. Shulman*, 84 Wash. 2d 433, 526 P.2d 1210, 1216 (1974).

Finally, in the Custody Case, appellants ask that the Bank be held liable for any damage caused to the tug while it was in the possession of the court-appointed custodian. The district court properly concluded that the Bank is not liable for such damage. As this court held in *Stevens v. F/V Bonnie Doon*, 655 F.2d 206, 209 (9th Cir. 1981), losses due to "deterioration of the boat during its period of lawful detention" cannot properly be recovered

from the arresting creditor who has neither control over nor responsibility for the vessel. The district court correctly determined that the Keenholts declaration, upon which appellants rely to establish the Bank's liability, fails to raise a triable issue as to whether the Bank acted improperly in its nomination of Campbell as substitute custodian.

AFFIRMED.

Dale W. House, Esq.
LANE POWELL & BARKER
550 West 7th Avenue, Suite 1650
Anchorage, AK 99501
(907) 227-9511

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RAINIER NATIONAL BANK, Plaintiff, vs. O/S GEORGEANN, Official No. 567631, her engines, boilers, etc., Defendant, BAGGEN TUG & BARGE CO., INC.; and SAMSON TUG & BARGE CO., INC., Defendants/Claimants.	Case No. A 85-064 FINAL JUDGMENT (Filed July 19, 1990)

This matter having come on regularly before the Court on plaintiff's Motion for Civil Rule 54(b) Judgment, and the Court having reviewed the pleadings of counsel and having granted plaintiff's motion for Civil Rule 54(b) Judgment, based on the Court's express determination that there is no just reason for delaying plaintiff's money judgment against defendants for breach of the August 8, 1975 Note; plaintiff having applied for entry of final judgment, and the Court finding that its above-referenced

determination has resolved all remaining claims brought by plaintiff Rainier National Bank against defendants Baggen Tug & Barge Company, Inc., and Samson Tug & Barge, Inc. (with the exception of costs and attorney's fees), and that entry of a final judgment is proper;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Rainier National Bank is granted a money judgment against Baggen Tug & Barge Company, Inc., and Samson Tug & Barge Company, Inc., jointly and severally, in the principal amount of $665,241.04, plus prejudgment interest in the amount of $556,731, for a total judgment to this date of $1,221,972.04. In partial satisfaction of this Judgment, the Court directs the disbursement to plaintiff Rainier National Bank of the principal sum of $669,447.28, plus all interest to date thereon, which funds having previously been deposited in an agency account (Account No. 41-014850-6) administered by First National Bank of Anchorage, 425 G. Street, Anchorage, Alaska, Pursuant to the Stipulation and Order Regarding Deposit of Sale Proceeds, dated July 7, 1989.

As the prevailing party, and by written contract, plaintiff is entitled to attorney's fees and costs, the amount thereof to be determined by further proceedings herein, which shall be conducted pursuant to Local General Rules 21 and 21.1. The amount of attorneys' fees and costs shall be set forth in a separate judgment to be entered by this Court.

LET EXECUTION ISSUE.

DATED this 17 day of July, 1990.

/s/ Andrew J. Kleinfeld
Judge of the United States
District Court

cc: O&J 3880
D. House (LANE)
W. Royce

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RAINIER NATIONAL BANK, Plaintiff, vs. O/S GEORGEANN, Official No. 567631, her engines, boilers, etc., Defendant, BAGGEN TUG & BARGE CO., INC.; and SAMSON TUG & BARGE CO., INC., Defendants/Claimants.	JUDGMENT (Filed July 6, 1988)

A85-064 CIV

IT IS ORDERED AND ADJUDGED that:

(1) Plaintiff Rainier National Bank is entitled to foreclose upon its preferred ship mortgage on defendant O/S Georgeann, Official No. 56631, her engines, boilers, etc. and accordingly the interests of Baggen Tug & Barge Company, Inc. and Samson Tug & Barge Company, Inc. in that vessel are terminated and plaintiff Rainier National Bank as trustee owns legal title to the vessel.

(2) Plaintiff Rainier National Bank shall take costs and attorney's fees from defendants, in the amount of $ ___ for costs and $ ___ for attorney's fees, for a total judgment of $ ___, payable by the defendants jointly and

severally, with interest at the rate determined pursuant to 28 U.S.C. § 1961.

(3) Defendants shall take nothing on their counterclaims against plaintiff.

DATED at Anchorage, Alaska, this 6 day of July, 1988.

/s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
United States District Judge

* Costs to be taxed by the Clerk of Court.

cc: O&J 3391
D. House (LANE)
W. Royce (STAFFORD)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RAINIER NATIONAL BANK, a national banking association with principal place of business in the State of Washington, as Trustee,

Plaintiff,

vs.

O/S GEORGEANN, Official No. 56631, her engines, broilers, etc.,

Defendant,

BAGGEN TUG & BARGE COMPANY, INC., an Alaskan corporation; SAMSON TUG & BARGE COMPANY, INC., an Alaskan corporation,

Defendants/Claimants.

ORDER

(Filed March 30, 1988)

A85-064 CIV

Plaintiff Rainier National Bank ("Rainier"), as trustee for Alaska Pulp Corporation ("APC"), brought this action against the O/S GEORGEANN, Baggen Tug & Barge Co., Inc. ("Baggen"), and Samson Tug & Barge Co., Inc. ("Samson") to foreclose a preferred ship mortgage. This court has jurisdiction over this matter pursuant to the Ship Mortgage Act, 46 U.S.C.A. 911-984 (1975) and pursuant to 28 U.S.C. 1333.

Defendants Baggen and Samson contend, among other things, that this case is not a simple foreclosure of a preferred ship mortgage. They contend that the Note and Mortgage comprise only one aspect of a larger contractual relationship between Ranier's beneficiary, APC, and the defendants. Defendants contend that this foreclosure action must be construed in light of the alleged larger contractual relationship, APC, which is not a party to this action.

Defendants contend that APC required the services of Samson to transport logs to various logging camps to APC's mills. Defendants contend that contrary to the language in the Note, APC agreed to loan Samson $1.3 Million, interest free, in order to construct the tugboat GEORGEANN. Defendants contend that APC agreed to provide Baggen with enough work to pay off the loan over ten years. Defendants contend that Samson agreed to build the tug, to tow logs for APC, and to pay off the loan with the towing revenues.

Defendants contend that Rainier did not loan any money to them but rather acted as trustee for collection of the loan made to Samson by APC. As a Japanese corporation, APC is not a "citizen" of the United States within the meaning of 46 U.S.C. 802 and 922 and is not eligible to hold a mortgage upon a vessel of the United States. Defendants claim that if APC would not be entitled to collect this debt because of claims and defenses of Samson, neither can Rainier be allowed to collect against defendants.

Defendants contend that APC breached its contract by failing to provide Samson with enough work to cover

loan repayment, by refusing to make equitable adjustments in the towing rates as it promised, and by terminating Samson's employment. Defendants contend that APC's breach of contract is a complete defense to the debt which Rainier is endeavoring to collect. This alleged breach also purportedly exposes APC as beneficiary and Rainier as trustees to defendants' alleged counterclaims.

The defendants' counterclaims are dismissed. These counterclaims are asserted against APC, an entity not a party to this suit. The counterclaims against APC are legally insufficient against Rainier and may not be addressed by the court.

Rainier and the defendants are parties to a carefully tailored mortgage agreement. The terms of the preferred ship mortgage are not ambiguous and are typical of a preferred ship mortgage executed at arms length. The Promissory Note states, among other things, that: "This contract is to be construed in all respects and enforced according to the laws of the State of Washington."

The parole evidence rule as traditionally stated in the State of Washington provides:

> [P]arole or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature which are valid, complete, unambiguous and not affected by accident, fraud, or mistake.

Emrich v. Connell, 716 P.2d 863, 866 (Wash. 1986).

In accordance with this rule, evidence that defendants' previously agreed to a zero interest loan with APC, as opposed to a ten percent interest rate, as stated in the agreement with the plaintiff is inadmissible. In addition,

this court may not admit as evidence defendants' assertion that the Mortgage be construed according to laws other than those of the State of Washington as stated in the Note.

The oral agreement allegedly reached by Baggen and APC prior to execution of the loan documents violates the statute of frauds and is not admissible. The Washington statute of frauds declares that any agreement which cannot be performed within one year is void "unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party charged therewith . . . " Wash. Rev. Code Ann. 19.36.010. The loan documents are not an adequate record of the alleged agreement with APC. Partial performance of the alleged obligations to APC do not exempt the agreement from the effect of the statute of frauds.

The purported oral agreement is not exempt from the statute of frauds on the grounds of promissory estoppel under Restatement (Second) of Contracts 90 (1981). Although some states have adopted the Restatement's formulation of the promissory estoppel doctrine, *see, e.g. Dresser Industries v. Foss Launch and Tug Co.*, 560 P.2d 393, 396 (Alaska 1977), Washington has explicitly declined to incorporate the provision into Washington law. *Family Medical Bldg. v. State Dept. of Social and Health Services*, 702 P.2d 459, 462-63 (Wash. 1985); *Lectus, Inc. v. Rainier National Bank*, 647 P.2d 1001, 1001-1002 (Wash. 1982); *Klinke v. Famous Recipe Chicken, Inc.*, 616 P.2d 644, 648 (Wash. 1980).

The elements necessary to establish economic duress or business compulsion are: (1) one side involuntarily

accepted the terms of another, (2) circumstances permitted no alternative to those terms, and (3) that said circumstances were the result of coercive acts of the opposite party. *Puget Sound Production Credit Association v. O/S Sablefish,* 575 F. Supp. 56 (D. Wash. 1983); *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.,* 584 P.2d 15 (Alaska 1978). Defendants have not established a case of economic duress or business compulsion.

In summary, the court finds that, there being no genuine issue as to any material fact, plaintiff is entitled to judgment as a matter of law.* Accordingly, it is ORDERED that the Motion of Rainier National Bank for summary judgment to foreclose its preferred ship mortgage is granted.

DATED at Anchorage, Alaska, this 30 day of March, 1988.

/s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
United States District Judge.

cc: D. House (LANE)
J. Friederici (DELANEY)
W. Royce (STAFFORD)

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* The magistrate's recommendation is accepted.

EXHIBIT A

PROMISSORY NOTE

$1,300,000.00 Seattle, Washington

August 8, 1975

FOR VALUE RECEIVED, without grace, each of the undersigned, SAMSON TUG & BARGE CO., an Alaska corporation, and BAGGEN TUG & BARGE CO., INC., an Alaska corporation, jointly and severally, promise to pay to the order of RAINIER NATIONAL BANK, a national banking association, as Trustee, the principal sum of ONE MILLION THREE HUNDRED THOUSAND DOLLARS ($1,300,000), with interest thereon from the date hereof at the rate of ten per cent (10%) per annum until maturity.

Said principal, together with interest as aforesaid, shall be paid in 120 equal monthly installments (such installments including interest) commencing October 1, 1975. Such sum, or more at the option of the undersigned, shall be paid on the first day of each and every month until the said principal sum, together with interest thereon, shall have been fully paid. Said principal and interest shall be paid in lawful money of the United States.

If default be made in the payment of this note, or any part thereof, or any interest thereon, then the principal sum with accrued interest shall at once become due and collectible without notice, time being of the essence of this contract, and said principal sum and interest shall bear interest from such default until paid at the rate of twelve per cent (12%) per annum.

In case suit is instituted to collect this note or any portion thereof, each of the undersigned promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in such suit.

This note with interest is secured by a First Preferred Ship Mortgage of even date herewith executed and delivered by Baggen Tug & Barge Co., Inc., the owner of the whole of the vessel GEORGEANN, Official No. 567631.

This contract is to be construed in all respects and enforced according to the laws of the State of Washington.

BAGGEN TUG & BARGE CO., INC. SAMSON TUG & BARGE CO.

By _____ By _____

President President

William G. Royce
ROYCE, WOLLENBERG & FRIEDMAN
Attorney for Defendants
P.O. Box C
Sitka, Alaska 99835
907-747-3257

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

RAINIER NATIONAL BANK, a national banking association with principal place of business in the in the State of Washington, as Trustee, Plaintiff, vs. O/S GEORGEANN, Official No. 56631, her engines, boilers, etc.; BAGGEN TUG & BARGE, CO., an Alaska corporation, Defendants.	IN ADMIRALTY No. A85-64C

AFFIDAVIT OF DOUG THENO

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

DOUG THENO, being first duly sworn on oath, deposes and states:

1. From 1963 through 1974 I as employed by Alaska Lumber and Pulp Company at its Sitka, Alaska pulp mill. I was assistant logging manager for the first two years. From 1965 through 1974 I was logging manager. I retired in 1974.

2. As logging manager, my duties included negotiating with logging and towing contractors for services. I also represented Alaska Lumber and Pulp Company in making financial agreements with these contractors. During the years I was employed by Alaska Lumber and Pulp Company, numerous loans were made to contractors for a variety of purposes including purchase of equipment. All of these loans were without interest. One of the reasons for no interest loans was that any interest charged a contractor would simply increase the contractor's costs which were the basis for negotiating a rate for services provided to Alaska Lumber and Pulp Company. In short, if Alaska Lumber and Pulp Company charged interest, Alaska Lumber and Pulp Company would have to increase the contractor's rates sufficient for the contractor to pay such interest.

3. In early 1974, Alaska Lumber and Pulp Company determined to construct a log barge. Alaska Lumber and Pulp Company needed the services of a 2,000 hp tug to tow the barge. I negotiated with George Baggen of Samson Tug to provide towing services. Alaska Lumber and Pulp Company authorized me to offer George Baggen a no-interest loan in the amount of approximately $1.1 million for the purpose of constructing a 2,000 hp tug. I offered this financing to Samson. It was agreed and understood between Alaska Lumber and Pulp Company and Samson that the tug to be constructed with this

financing would be utilized by Alaska Lumber and Pulp Company to tow the new log barge. It was also agreed and understood that the rates for said services and the employment of the tug would be at a level sufficient to cover operating costs, repay the loan, and net a reasonable profit for Samson. I made such agreements on behalf of Alaska Lumber and Pulp Company only after receiving specific approval from my supervisors.

/s/ Doug Theno
DOUG THENO

SUBSCRIBED AND SWORN to before me this 15 day of July, 1985.

[SEAL]

/s/ Illegible
NOTARY PUBLIC in and for the State of Washington, residing at

Illegible

1TDF/F

TRUST AGREEMENT

THIS IS AN AGREEMENT made and entered into as of this 8 day of August, 1975, between RAINIER NATIONAL BANK, a national banking association, as Trustee (the "Trustee"), and ALASKA PULP AMERICA, INC., a Washington corporation ("APA").

RECITALS

A. APA has loaned to Samson Tug & Barge Co., Inc., an Alaska corporation ("Samson") the principal sum of $1,300,000 (the "Loan") pursuant to a Loan Agreement dated December 1, 1974.

B. Samson agreed to use the proceeds of the Loan to construct and outfit a new steel tugboat (80' x 27'). The tugboat is now complete, has been named GEORGEANN, and has been documented as a vessel of the United States, Official No. 567631 (the "Vessel").

C. Samson has transferred to Baggen Tug & Barge Co., Inc., an Alaska corporation, ("Debtor") all of its interest in the Vessel and Debtor has agreed to assume and pay the Loan. APA is willing to have Debtor assume the Loan on the condition Samson remain liable thereon and co-sign as a maker a promissory note evidencing the Loan. Debtor wishes to provide APA with the benefits of a preferred maritime lien upon the Vessel to secure the repayment of the Loan. States within the meaning of Section 2 of the Shipping Act of 1916, as amended, 46 United States Code § 802, (the "Shipping Act"); thus it is not eligible to hold a mortgage upon a vessel of the United States.

E. Trustee is a citizen of the United States within the meaning of Section 2 of the Shipping Act, and has been approved by the Secretary of Commerce pursuant to Public Law 89-346, 46 United States Code §§ 808, ("P.L. 89-346"), Section 37 of the Shipping Act, 46 United States Code § 835, and Subsection O of the Ship Mortgage Act, 1920, 46 United States Code § 961 (the "Ship Mortgage Act"), thus Trustee is an eligible trustee entitled to hold mortgages on vessels of the United States.

NOW, THEREFORE, in consideration of the premises and the covenants herein contained, it is mutually agreed as follows:

I. TRUSTEE'S RIGHTS AND DUTIES

1.1 The Trustee is acting in this transaction solely as Trustee for APA. The Trustee represents that it is an approved Bank or Trust company within the meaning of P.L. 89-346.

1.2 The Trustee agrees to obtain from Samson and the Debtor a promissory note in the sum of $1,300,000 to evidence the Loan, to acquire from the Debtor a First Preferred Ship Mortgage on the Vessel, and to hold the same for the benefit of APA as set forth below.

1.3 The Trustee shall not be required to advance funds with respect to the Loan as the same has been fully advanced by APA, and receipt thereof hereby is acknowledged by Samson and the Debtor. Samson and the Debtor have agreed to execute and deliver to the Trustee in form acceptable to the Trustee a Note in the amount of $1,300,000, payable to the Trustee's order, and the Debtor

has agreed to execute and deliver to the Trustee in form acceptable to the Trustee a First Preferred Mortgage on the Vessel, which mortgage shall be recorded at the Debtor's expense in the office of the U. S. Coast Guard, Documentation Officer, at the part of documentation of the Vessel and endorsed on the Vessel's document in the manner required by 46 U.S.C. § 921 and § 922, respectively. Debtor has agreed to obtain and deliver to the Trustee a Certificate of Ownership (Form CG-1330) showing Debtor as owner of the whole of the Vessel and said First Preferred Mortgage as recorded and endorsed as aforesaid, and showing no other liens or encumbrances against the Vessel.

1.4 The Trustee shall be under no duty to investigate, discover and determine whether or not a default of any kind exists under the Note or First Preferred Ship Mortgage and may rely exclusively upon such information as to defaults under the Note or First Preferred Ship Mortgage as may come Trustee agrees to report to and inform APA promptly of any information which the Trustee shall receive concerning any default, such information to be given by air mail letter addressed to APA at P. O. Box 621, Wrangeli, Alaska 99929. The Trustee further agrees that APA may exercise any and all the rights of inspection given to the Trustee under the said First Preferred Ship Mortgage.

1.5 Trustee may seek advise form APA in the case of any default by Debtor as to whether APA knows any reason why Trustee should forbear enforcing the rights granted to it under the said Note or First Preferred Ship Mortgage in favor of Trustee, but the discretion to forbear or not to forbear is vested in the Trustee and it shall act in

the best interest of the Trust. In deciding whether to enforce any right under the said Note and First Preferred Ship Mortgage, Trustee shall be liable only for the consequences of its own negligent or willful misconduct.

1.6 The Trustee shall receive reasonable quarterly compensation in accordance with its schedule of charges for similar services, and reimbursement of its expenses, both to be paid by the Debtor or Samson, which payments APA guarantees. In addition, the Trustee shall receive reasonable compensation for any extraordinary services rendered hereunder and reimbursement of expenses therein incurred. The Trustee shall not be required to take any action to enforce its rights under the said Note or First Preferred Ship Mortgage or any security agreement until such compensation and reimbursement of expenses then owing have been fully paid to the Trustee by either the Debtor or APA.

1.7 In the event the Debtor shall fail to make any payment provided for in said Note or First Preferred Ship Mortgage promptly when due or to perform any covenant therein contained, the Trustee shall not be required to take any action with respect thereto unless and until APA shall have deposited with the Trustee, in addition to any other sums to be paid by APA hereunder, the estimated amount of costs, expenses, attorneys' fees and extraordinary Trustees' fees incurred or to be incurred by the Trustee in taking such action. Such amount shall be paid by APA from time to time as requested by the Trustee. In the event the action taken by the Trustee results in foreclosure of said First Preferred Ship Mortgage and a judgment against the Debtor for an amount in excess of the net proceeds realized from the foreclosure of

said Mortgage, the Trustee will pay the sums realized from foreclosures to APA and will assign its interest in said personal judgment to APA and shall have no other duty, responsibility or liability with respect thereto.

1.8 Notwithstanding any other provision to the contrary either herein or in the Note of First Preferred Ship Mortgage, the Trustee shall not be required to take, or to refrain from taking, any action to enforce its rights under the said Note and First Preferred Ship Mortgage which is contrary to law. In the event the Trustee deems it advisable to employ legal counsel with respect to its duties hereunder, it may do so and charge the reasonable expenses thereof to this trust, and the Trustee shall not be liable for the consequences of any action or inaction taken in reliance upon any advice furnished by such legal counsel if APA shall have approved the appointment of the particular counsel chosen, which approval shall not be unreasonably withheld.

1.9 After deducting its compensation and its reimbursement for expenses, the Trustee shall remit to APA all sums acquired by the Trustee. Income received by Trustee shall be remitted to APA in the same tax year (of Trustee) as received.

1.10 The Trustee may resign at any time upon giving written notice to APA and shall automatically be disqualified if the Secretary of Commerce publishes a Notice of Proposed Findings of Lack of Qualification pursuant to 46 C.F.R. Part 221.27 which shall not have been withdrawn within ten (10) days. The Trustee shall immediately notify APA of any such publication. APA agrees to appoint a

qualified successor Trustee within ten (10) days following its receipt of such written notice, or if it fails to do so, then the Trustee may appoint a qualified bank (approved by the Secretary of Commerce pursuant to P.L. 89-346) to act as such successor Trustee and such appointment shall be binding on APA. Any resignation of the Trustees shall be effective upon the appointment of a qualified successor Trustee and the latter's acceptance of the appointment.

1.11 The Trustee has been notified that there may have been other and previous dealings between the Debtor, other parties, and/or APA. It is understood and agreed that the trust estate shall be limited to the Note of Debtor and Samson and the First Preferred Ship Mortgage on the Vessel; and any rights granted, or duties imposed, by any other agreements to which Debtor may be a party shall be excluded from the trust.

II. APA'S RIGHTS AND DUTIES

2.1 To the extent the Loan has not been fully advanced to the Debtor, APA shall advance to the Trustee sufficient funds for the Trustee to make the Loan to Debtor and shall direct the Trustee in writing as to the amount and time for making each disbursement to the Debtor. Upon completion of all acts contemplated by Paragraph 1.3 above, and if no default shall exist under the First Preferred Ship Mortgage (which determination shall be made by APA and not the Trustee), APA shall cancel the promissory note of Samson Loan.

2.2 APA shall have no legal title to any part of the Note and First Preferred Ship Mortgage.

2.3 APA shall have the right to investigate, discover and determine whether a default of any kind exists under said Note or First Preferred Ship Mortgage or any applicable security agreement and shall have all the rights of inspection given to the Trustee under the said Preferred Ship Mortgage APA shall have the right to inform the Trustee thereof.

2.4 APA is obligated to make the payments provided in Paragraphs 1.6 and 1.7 above, if not made by Samson or Debtor.

2.5 APA may enforce by actions of law, equity or otherwise the duties and obligations of the Trustee to APA if the same be neglected.

2.6 APA may discharge the Trustee and appoint a new qualified Trustee by written notice to the Trustee and to the Debtor and Samson.

2.7 APA hereby agrees to indemnify the Trustee against any liability, cost or expense (including counsel fees) which may be incurred in connection with this Trust Agreement or with any action or failure to act under the terms of the Preferred Ship Mortgage, except any liabilities, costs or expenses (including counsel fees) which may result from the Trustee's negligent or willful misconduct. This indemnity shall survive the termination of this Trust Agreement.

2.8 No term or provision of this Trust Agreement may be changed, waived, discharged or terminated unless the same shall be in writing and signed by the

party against whom enforcement is sought and then such consent shall be effective only in the specific instance and for the purpose for which given.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 8 day of August, 1975.

ALASKA PULP AMERICA, INC.

By /s/ K. Nagumes
Resident Vice President

RAINIER NATIONAL BANK, Trustee

By /s/ D. C. Wilson
Trust Officer

William G. Royce
Attorney for Defendants/Claimants
P. O. Box C
Sitka, Alaska 99835
907-747-3257

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

RAINIER NATIONAL BANK, a national banking association with principal place of business in the State of Washington, as Trustee, Plaintiff, vs. O/S GEORGEANN, Official No. 56631, her engines, boilers, etc., Defendant, BAGGEN TUG & BARGE COMPANY, INC., an Alaska corporation; SAMSON TUG & BARGE COMPANY, INC., an Alaska corporation, Defendants/ Claimants.	IN ADMIRALTY No. A85-64C

AFFIDAVIT OF GEORGE BAGGEN

STATE OF)
) ss.
COUNTY OF)

This affidavit is based on firsthand knowledge. For convenience, this affidavit follows the Statement of Facts format closely.

A. Pre-1974 background.

1. Samson Tug is a tow boat business which was started in Southeast Alaska in 1937 by George Baggen, Sr. Later, George Baggen, Jr. managed the operation. I am the current president of Samson Tug and a third generation owner. Prior to 1960, Samson Tug's business consisted of towing log rafts for various small sawmills in Juneau, Sitka and Petersburg. In 1960, ALP commenced production at its Sitka pulp mill. Thereafter, nearly all of Samson Tug's work involved towing log rafts or barges for ALP. By 1974, ALP accounted for 99% of Samson Tug's business.

2. ALP's historical practice in setting towing rates was as follows: (1) ALP would review Samson Tug's cost records to determine operating expenses and debt load, (2) ALP would then set a rate calculated to cover all of Samson's operating expenses including debt retirement and net a profit based upon ALP's forecasted need for towing services.

3. During one three year period, ALP made only minimal adjustments to Samson Tug's towing rates due to pending negotiations between Samson Tug and the Inland Boatmen's Union. When these negotiations were completed, ALP raised Samson Tug's towing rates by 50%. The purpose of this rate increase was to equitably adjust towing rates, both retroactively and prospectively.

4. In 1973, ALP provided Samson Tug with $350,000 of financing at zero interest for the purpose of purchasing the vessel ALEUTIAN SALVOR with repayment to be made out of towing revenues paid to Samson Tug by ALP. These towing revenues were set at a rate sufficient for Samson Tug to cover all operating costs, repayment of debt, and net a profit. In all contract negotiations, Mr. Doug Theno would represent ALP and would make oral agreements on its behalf.

5. I assumed responsibility for running the family business upon the death of my father, George Baggen, Jr., in 1972. I was 24 years old. At the request of my mother, Anna Baggen, Jack Parrish, an experienced businessperson who had assisted in managing Samson's operations for many years, stayed on.

B. The Contract between ALP and Samson Tug.

6. Prior to 1974, ALP utilized a log barge for the purpose of all-weather transportation of logs. This log barge was lost in a storm off Cape Edgecomb near Sitka in December, 1973. The barge was being towed by Samson's 900 horsepower tug, the NEOGA, at the time she was blown backwards onto Cape Edgecomb. Following this loss, ALP decided to build a replacement barge.

7. The contract between ALP and Samson Tug was formed in a series of meetings between Doug Theno representing ALP and Jack Parrish and I representing Samson Tug. All parties understood that insurance underwriters required any tug towing the new log barge to have at least 2,000 horsepower. No such vessel had ever routinely operated in Southeast Alaska.

8. In the spring of 1974, I had a meeting with Doug Theno at his ALP office. The meeting opened with a discussion of ALP's need for a 2,000 horsepower tug. I expressed interest in building such a tug if ALP would finance its construction and guarantee sufficient work and towing revenues to cover the cost of its operation, repay any debt and net a profit. Doug Theno said ALP would loan the money at no interest and instructed me to get a proposal for constructing such a tug as soon as possible.

9. Samson Tug then engaged a Seattle shipbuilder, Marine Power, to do preliminary design work and cost estimates. Marine Power provided me with a set of line drawings for the vessel which ultimately became the GEORGEANN. I took these drawings to a second meeting with Doug Theno at his ALP office. I stressed that the drawings were only preliminary and the cost estimate was in the neighborhood of $1,000,000. I stated that Marine Power was working on more detailed drawings and would then be able to give a more precise cost estimate. Doug Theno told me not to wait for more drawings but to start building the tug immediately. He stated that ALP would provide no interest financing as needed and work out repayment out of tow revenues. Mr. Theno stated that the new log barge would be in constant service once it was delivered to Sitka. He stated it was essential that the new tug construction be commenced immediately. Following this meeting, I met with Jack Parrish and discussed ALP's proposal and the advisability of incurring a debt in excess of $1,000,000. Based on ALP's promises to provide no interest financing and to arrange repayment out of towing revenues to be

earned by the new tug, Samson Tug agreed to build the GEORGEANN.

10. The terms of the oral contract were:

(1) Samson Tug would build a 2,000 horsepower tug to provide a vessel capable of towing ALP's new log barge.

(2) ALP would finance 100% of the construction cost of this vessel on a no interest basis.

(3) Repayment of the amount loaned by ALP would come from towing revenues received for services rendered ALP.

(4) ALP would set towing rates and utilize Samson Tug's services at a level which would cover Samson Tug's operating expenses, debt repayment, and net a reasonable profit. No formal written contract was contemplated either by ALP or Samson Tug respecting this agreement.

11. On September 1, 1974, Baggen entered into a contract with Marine Power to build a 2,000 horsepower, 87' steel tug for $1.1 million.

12. Shortly after Samson Tug accepted ALP's proposal with respect to building the O/S GEORGEANN, ALP informed me that a back-up tug would be needed. ALP represented that Samson Tug would be towing the barge 250 days per year. ALP was, however, concerned about tug breakdowns and requested that Samson Tug upgrade one of its existing tugs to 2,000 horsepower. ALP assured me that ALP's needs for total towing services would justify the cost of repowering the tug. Based on these representations, Samson Tug repowered and

upgraded the O/S NEOGA at a total cost exceeding $1 million. $650,000 of which was borrowed from the National Bank of Alaska and $400,000 was provided by Samson Tug. ALP represented to me that all its vessels, including the NEOGA, would be employed by ALP at rates and frequencies such that Samson Tug's operations would be profitable.

13. In January or February, 1975, at a time well into the construction of the O/S GEORGEANN and the repowering of the O/S NEOGA, Mr. Hayashi, ALP's vice president, informed me that ALP would prefer to guarantee the O/S GEORGEANN loan and have it issued through National Bank of Alaska as opposed to making the loan directly. I learned that ALP had already approached National Bank of Alaska with this request. I was asked to cooperate in exploring this financing. The National Bank of Alaska ultimately declined to participate in financing the GEORGEANN.

C. ALP changes terms of contract.

14. By December, 1974, substantial progress payments were due to Marine Power & Equipment for the construction of the GEORGEANN. ALP made an initial advance of $100,000 on December 3, 1974. In January, 1985, ALP advanced an additional $200,000. Marine Power & Equipment was paid over $250,000 by February, 1975. At some point during the winter of 1974-1975, I first learned that ALP proposed to change the original no interest loan agreement. Jim Rynearson asked me to have a breakfast meeting with him. At this meeting, Mr. Rynearson stated that the O/S GEORGEANN loan would

have to bear interest at 10%. I questioned this change and was informed that it was necessary because of recent changes in ALP's corporate structure, specifically the formation of Alaska Pulp America. Mr. Rynearson reassured me that this was merely corporate paperwork and that rates for towing would be adjusted to absorb any additional financing costs caused by the inclusion of an interest term.

15. When ALP changed the no interest term to a 10% interest term, Samson Tug was committed by contract with Marine Power to construct the O/S GEORGEANN at a cost of $1.1 million. Samson Tug was also fully committed to upgrading the NEOGA. When the 10% interest term was added by ALP, neither Samson Tug nor I had any choice but to accept this term. I was completely committed to construct the GEORGEANN and repower the NEOGA by the time ALP added the interest term. I had no other realistic possibility of securing financing. My only choices were to accept ALP's 10% interest term or default on my construction contract with Marine Power and be unable to complete the repowering of the NEOGA. Such events would have caused the collapse of my business. ALP was aware that I had no alternatives but to accept the interest term and ALP encouraged me to accept the interest term by representing that the rates would be equitably adjusted to cover this additional financing cost. Following this meeting with Mr. Rynearson, I was requested to come to ALP's Silver Bay pulp mill offices and sign a note and loan agreement. These documents were signed in the winter of 1974-1975 or spring of 1975, substantially following the date shown on the note of December 1, 1974.

16. In addition to the inclusion of a 10% interest term, WLC was substituted for ALP as the lender. I questioned this change and was told again that it simply reflected intercorporate housekeeping and was necessary for reasons important to the Japanese corporations but not important to me. Notwithstanding this corporate housekeeping, all sums advanced to Samson Tug were by checks from ALP.

17. In August, 1975, the O/S GEORGEANN was completed. The total amount ultimately advanced by ALP and/or WLC was $1.3 million. Once the vessel was documented, I signed a new note and preferred marine mortgage providing that Rainier, as trustee, was the mortgage and obligee. I viewed these documents as being merely replacements of and substitutions for the loan agreement and note bearing date of December 1, 1974. The same considerations which mandated his earlier acquiescence in the interest term still existed. No alternate financing was available and refusal to execute the new loan documents could result in acceleration of the construction loan with disastrous consequences to my business.

18. Rainier participated in none of the dealings between ALP or WLC and me prior to August 8, 1975. Rainier loaned me no money and is present in this transaction only because ALP, a foreign corporation, cannot hold a security interest in a U.S. registered vessel.

D. Samson's performance; tow rates 1975-1983.

19. By the fall of 1975, Baggen and Samson Tug had completed all initial performance required under the

terms of the oral contract. Samson had incurred $1.9 million in debt, spent an additional $600,000 in cash and the O/S GEORGEANN was built and the O/S NEOGA was repowered. Both vessels were ready to do the work promised by ALP.

20. ALP was to set towing rates following the same procedure that had been historically utilized by this corporation. First, the contractor's actual or estimated costs were collected by ALP accountants; second, ALP would forecast its need for contractor services; third, a rate would be developed and paid to the contractor for services.

21. ALP in its operations used a method of preliminary and final payment which made it very difficult to allocate tow revenues to the costs of a particular tow. In the period from 1975 through 1983, ALP had logging contractors spread throughout the middle and northern portions of Southeast Alaska. Most log production occurred between the months of June and October. Once the logs were dumped in the water by various logging contractors, they would be held in storage at the camp site until towed to various interim log storage areas. The logs were ultimately towed to either the pulp mill operated by ALP in Sitka or the sawmill operated by WLC in Wrangell. Many factors including market conditions and needs for various amounts and grades of timber influenced the length of time logs would remain in storage areas. The log rafts or barge loads of logs were not ultimately scaled until immediately before they were processed at either ALP's pulp mill or WLC's sawmill. In the

interim, log rafts would be divided, sorted and reconstituted to suit ALP and WLC's needs. Towing contractors would receive an initial advance based on an estimate of log scale volume for towing. The final scale would not occur until immediately before the logs were consumed. In some instances, this final scale could be as much as two years following the initial towing. Towing contractors would not receive a final payment for towing until after the logs were scaled and consumed. During the years 1975 through 1983, Samson Tug provided thousands of individual tows of log rafts or the log barge. Because of this system of delayed accountings and payments, it was very difficult to determine profits or loss on a trip by trip basis.

22. Although I had difficulty in calculating with any precision whether the log barge tow rates and log raft tow rates paid by ALP were sufficient to cover operating costs, debt repayment and profit on a trip by trip basis, it became clear by 1977 that the rates were on a general basis insufficient. First of all, ALP's forecasted use of the log barge turned out to be much higher than its use in actuality. The 250 days of towing used as the basis for rate setting was never achieved. Rather, the actual log barge towing was 150 days or approximately 60% of that forecast.

23. It was also apparent that my businesses were not netting the reasonable profit promised by ALP but were in fact beginning to lose money. From 1970 through 1975, Samson Tug showed steady improvement in its financial condition with retained earnings going from $267,000 to $700,000. From 1976 to 1983, however, the retained earnings of Samson Tug declined from $887,000

to $-(287,000). This reversal of Samson Tug's fortunes was caused directly by ALP's failure to provide the work at sufficient rates as promised.

24. I made numerous requests that ALP make equitable adjustments on the towing rates. ALP would in turn represent to me that rates would be changed. Don Soukup, Logging Manager, spent a great deal of time working with me to collect towing costs from specific points to various log storage areas. In the end, the rate adjustments proposed by Soukup were not allowed by his supervisor, Mr. Rynearson.

25. During the period from 1977 to 1983, ALP did, however, make a number of modifications in its method of paying Samson Tug for tow services. Throughout the period from 1975 to 1983, ALP continued to make assurances that towing rates would be equitably adjusted in order to make our business profitable. I was encouraged to rely on ALP's assurances of equitable rate adjustments and in fact spent a great deal of time with ALP accountants and other employees to identify costs so that rates could be set appropriately. During this time period, ALP shifted from flat fees per trip to fees based on gross log volume to fees based on net log volume. Each time I was assured that the new rate system would solve the past inequities. Each time the rates when analyzed after final scaling and payment were insufficient to cover the direct operating and financing costs of the O/S GEORGEANN in particular and other vessels in Samson's fleet in general.

26. During the years 1978 through 1983, ALP never provided Samson Tug with the employment it had promised. Samson Tug was now encouraged by ALP to find substitute work for the vessels that ALP had previously requested Samson to build and repower.

E. ALP ceases providing Samson Tug with work.

27. In December, 1982, ALP ceased hiring Samson Tug for any towing services. ALP cited two factors in this action: (1) accidents in which the log barge was damaged and log rafts were lost and (2) inability to obtain hull insurance on the log barge. I contacted George Farnsworth of Corroon & Black in Seattle. Mr. Farnsworth is a marine insurance broker. I learned that Samson Tug could in fact insure the log barge for ALP's benefit at a rate of approximately one-half of the rate ALP had been paying prior to its claim of inability to insure.

28. Samson Tug ceased making payments on the GEORGEANN note when its employment with ALP terminated. At that point, Samson Tug had paid a total of $1,464,677. Rainier claimed an additional $758,000 was due. There followed one year of no action by either party, then one year of negotiations with respect to this matter.

F. Rainier forecloses on mortgage.

29. In May, 1984, my attorney, John Cooper of Seattle, informed APC and its counsel in writing that the original agreement involved a no interest note and that the interest provision was imposed upon me, coupled

with a promise of equitable rate adjustments to cover any increased costs.

30. I made repeated attempts to arrange an accommodation with Rainier which would fully protect Rainier's interests while avoiding the very substantial losses which result from arrest and loss of use of the GEORGEANN. These offers to mitigate damages while providing Rainier with adequate security were rejected until May of 1986, when Rainier stipulated to return the GEORGEANN. The vessel when returned was found in very bad mechanical condition from apparent neglect while in custody.

G. Damages of Samson Tug and Baggen.

31. In July, 1985, the O/S GEORGEANN was arrested where she lie at port at Samson's facility in Sitka, Alaska. She was moved under the authority of the U.S. Marshall to the facilities of Campbell Towing at Wrangell, Alaska. Due to the arrest of the O/S GEORGEANN, Samson Tug has lost revenue in an amount approximating $1,000,000. The fact of these ongoing losses has been communicated by my attorney, William Royce, to plaintiff's counsel.

32. Pursuant to a recent joint stipulation and order, the vessel was released to the custody of Samson Tug in May, 1986. The post-release survey has disclosed substantial damage to the machinery of the GEORGEANN caused by improper lay-up and maintenance while in custody. It is estimated that the repair of such damage will exceed the cost of $100,000. I intend to tender the

vessel back to plaintiffs when my expert's inspection is completed.

33. I estimate that my damages caused by APC's failure to meet its obligations under the oral agreements described above exceed $2,000,000. I have suffered additional damages due to Rainier's actions in seizing and physically damaging my tug GEORGEANN. These damages are estimated to exceed $1,000,000.

/s/ George Baggen
GEORGE BAGGEN

SUBSCRIBED AND SWORN to before me this 9 day of June, 1986.

/s/ Illegible
NOTARY PUBLIC in and for the State of Washington, residing at Illegible Island.

6JB/A

CHAPTER 19.36
FRAUDS, STATUTE OF

Section

19.36.010. Contracts, etc., void unless in writing.

19.36.010. Contracts, etc., void unless in writing

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) Every special promise to answer for the debt, default, or misdoings of another person; (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) Every special promise made by an executor or administrator to answer damages out of his own estate; (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

Enacted by Code 1881. § 2325. Amended by Laws 1905, ch. 58, § 1.

46 U.S.C. § 802

§ 802. Corporation, partnership, or association as citizen

(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly, or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Sept. 7, 1916, c. 451, § 2, 30 Stat. 729; July 15, 1918, c. 152, § 2, 40 Stat. 900; June 5, 1920, c. 250, § 38, 41 Stat. 1008; Sept, 21, 1959, Pub.L. 86-327, § 3, 73 Stat. 597.

46 U.S.C. § 922

§ 922. Preferred mortgages

(a) A valid mortgage which at the time it is made, includes the whole of any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than twenty-five gross tons), shall, in addition, have, in respect to such vessel and as of the date of the compliance with all the provisions of this subsection, the preferred status given by the provisions of section 953 of this title, if –

(1) The mortgage is endorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in section 921 of this title, together with the time and date when the mortgage is so endorsed:

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgage or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated in sections 888 and 802 of this title, be deemed a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the condition enumerated in this section is hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage –

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subsection (e) or (f) of this section.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the

mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.

June 5, 1920, c. 250, § 30. subsec. D, 41 Stat. 1000; June 27, 1935, c. 319, 49 Stat. 424; Sept. 26, 1961, Pub.L. 87-303, § 1(a), 75 Stat. 661

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No. 92-565

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BAGGEN TUG & BARGE CO., INC.
and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully suggests Petitioners' questions presented misstate the issues before this Court. The only issue actually presented by the petition is:

Whether a court sitting in admiralty may refuse to enforce an alleged oral agreement that violates a state integrated agreement (*parol* evidence) rule, when: (1) the parties contracted for the application of that state's law; (2) the state integrated agreement rule in question does not conflict with the general federal maritime law; and (3) the parties' contract is not within the traditional jurisdiction of the admiralty courts.

LIST OF PARTIES AND RULE 29.1 LIST

Respondent agrees with Petitioners' list, with the exception that Seattle-First National Bank, not Security Pacific National Bank, is successor to Rainier National Bank. Bank of America, in turn, is the parent of Seattle-First National Bank.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties and Rule 29.1 List ii

Table of Contents iii

Table of Authorities vi

I. Statement of the Case 2

A. The Parties 2

B. The Facts 2

1. The Note and Mortgage 2

2. Purpose of the Note and Mortgage 5

3. The Trust Agreement Between Rainier and APC 7

4. Baggen's Subsequent Performance and Default 7

C. The Lower Court Proceedings 8

1. Before the District Court 8

2. Before the Court of Appeals . . . 10

II. Argument 11

A. The Petition Presents No Important Question of General Federal Maritime Law Requiring This Court's Review 11

1. The Ninth Circuit Properly Enforced an Express Contractual Choice of Law 11

2. The Ninth Circuit Properly Applied a State Law Rule That Is Consistent with the Comparable General Federal Maritime Rule 13

3. The Ninth Circuit Decision Does Not Concern a Contract Traditionally Within the Jurisdiction of the Admiralty Courts 15

B. The Petition Does Not Properly Present the Issues Petitioners Ask This Court to Review 16

1. Petitioners Did Not Timely Raise the Issues They Now Raise Before This Court 16

2. Petitioners' Present Theory Is Precluded by Its Proof Offered Below in Support of an Alternative and Factually Inconsistent Theory 18

3. Petitioner Did Not Timely Appeal From the Decree and Order of Sale 19

III. Conclusion 21

TABLE OF AUTHORITIES

CASES	PAGE
A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493 (9th Cir. 1988)	13
Babb v. Schmidt, 496 F.2d 957 (9th Cir. 1974)	17
Baltimore & Ohio R.R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955)	19
Bank of California v. Starrett, 110 Wash. 231, 188 P. 410 (1920)	14
Blum v. Bacon, 457 U.S. 132 (1982)	19, 20
Browder v. Director, Dept. of Corrections, 434 U.S. 257 (1978)	20
California v. Taylor, 353 U.S. 553 (1957)	17
Carr v. FTC, 302 F.2d 688 (1st Cir. 1962)	17
Citibank, N.A. v. Data Lease Financial Corporation, 645 F.2d 333 (5th Cir. 1981)	20
Detroit Trust Co. v. Steamer THOMAS BARLUM, 293 U.S. 21 (1934)	15

Dietrich v. Key Bank, N.A., 693 F. Supp. 1112 (S.D. Fla. 1988) 12

Har-Win, Inc. v. Consolidated Grain & Barge Co., 794 F.2d 985 (5th Cir. 1986) 14

J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR, 457 F.2d 815 (5th Cir.) (*en banc*), *cert. denied*, 409 U.S. 948 (1972) 15

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 9, 10, 11, 12, 13, 14, 15, 16

Meyer v. Armstrong, 49 Wash. 2d 598, 304 P.2d 710 (1956) 14

Palmer v. Reconstruction Finance Corp., 164 F.2d 466 (2d Cir. 1947), *cert. denied sub nom. New York, N.H. & H.R. Co. v. RFC*, 334 U.S. 811 (1948) 17

People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1858) 15

Ray v. Law, 7 U.S. (3 Cranch) 179 (1805) 20

The TUNGUS v. Skovgaard, 358 U.S. 588 (1959) 16

U.S. for Use and Benefit of General Dynamics Corp. v. Home Indemnity Co., 489 F.2d 1004 (7th Cir. 1975) 19

U.S. v. Klotz, 503 F.2d 1056 (8th Cir. 1974) (*per curiam*) 17

Union Fish Co. v. Erickson, 248 U.S. 308 (1919) 9, 10, 11, 12, 16

Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948) 18

Whitman Realty & Inv. Co. v. Day, 161 Wash. 72, 296 P. 171 (1931) 14

STATUTES

28 U.S.C. § 1333 8

46 U.S.C. § 922(a) 5

46 U.S.C. § 922(b) 5

46 U.S.C. § 951 8

46 U.S.C. § 954(a) 8

46 U.S.C. § 31301 *et seq.* 2

Pub. L. 100-710 2

RULES

Supreme Court Rule 15.1 2

Supreme Court Rule 29.1 3

Federal Rule of Appellate Procedure 4(a) 20

MISCELLANEOUS

Restatement (Second) of Conflict of Laws § 187 12

Restatement (Second) of Trusts § 329 9

Anno., *Threat to Break a Contract as Duress*, 70 L. Ed. 822 (1926) 18

S. Friedell, 1 *Benedict on Admiralty* (6th ed. 1992) 12, 15

T. Schoenbaum, *Admiralty and Maritime Law* (3d ed. 1987) 14

J. Wigmore, 9 *Wigmore on Evidence* (Chadbourn rev. 1981) 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BAGGEN TUG & BARGE CO., INC.
and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rainier National Bank ("Rainier") respectfully requests that this Court deny the Petition for a Writ of Certiorari, which seeks review of the Ninth Circuit's decision in this case, an unpublished disposition reported at 962 F.2d 14 (1992) (Table).

I.
STATEMENT OF THE CASE

Rainier preserves its rights under Rule 15.1 by addressing, in the following statement of the case, any factual misstatements made by Petitioners.

A. The Parties.

This is a mortgage foreclosure case, involving the foreclosure of a First Preferred Ship Mortgage under the Ship Mortgage Act of 1920.[1] Petitioners Baggen Tug & Barge Co., Inc. and Samson Tug & Barge Co., Inc. (collectively "Baggen") are jointly and severally liable under the mortgage and related instruments at issue. Rainier holds the mortgage and related instruments as trustee for Alaska Pulp Corporation ("APC"), who has never been made a party to the case.

B. The Facts.

1. The Note and Mortgage.

This case arises out of Baggen's default on obligations under a promissory note, secured by a First Preferred Ship Mortgage. On August 8, 1975, Baggen gave Rainier a one-page promissory note (the "1975 Note" or "Note").[2]

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[1] In 1988, Congress repealed the Ship Mortgage Act of 1920, and passed a new law providing a revised statutory scheme governing mortgages on U.S. vessels. *See* Pub. L. 100-710 (effective January 1, 1989); *see also* 46 U.S.C. Ann. § 31301 *et seq.* (West Supp. 1992). The new act, however, made no changes material to this proceeding. Rainier therefore will continue to cite to the prior law, which may be found in the United States Code Annotated hardback volume containing 46 U.S.C. sections 721 to 1100.

[2] Complaint In Rem and In Personam to Foreclose Preferred Ship Mortgage ("Complaint"), CR 1, Ex. 1.

The Note was executed by George F. Baggen, as president of petitioners Baggen Tug & Barge and Samson Tug & Barge. These entities "jointly and severally" promised to pay to Rainier, "as Trustee, the principal sum of . . . $1,300,000. . . ." This sum was expressly stated to be "with interest thereon . . . at the rate of ten percent (10%) per annum until maturity." In the event of default in payment of "any part . . . or any interest," the outstanding principal sum "with accrued interest" at once became "due and collectible. . . ." The Note was "to be construed in all respects and enforced according to the laws of the State of Washington."

By its terms, the Note was an unqualified promise to pay -- Baggen's repayment obligation was not limited in any way to a particular source of funds (e.g., towing fees earned for services rendered to APC).

The Note was to be "secured by a First Preferred Ship Mortgage . . . executed and delivered by Baggen Tug & Barge Co., Inc., the owner of the . . . GEORGEANN. . . ." Accordingly (and also on August 8), a sixteen page First Preferred Ship Mortgage (the "Mortgage") was given by Baggen, to Rainier.[3] The Mortgage was between Baggen Tug & Barge Co., Inc. and Rainier, "as Trustee."[4] The Mortgage was given to secure Baggen Tug & Barge Co., Inc.'s payment of the Note, "both principal and

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[3] Complaint, CR 1, Ex. 2.

[4] *Id.* at 1.

interest. . . ."[5] Under the Mortgage, Baggen "granted, conveyed, mortgaged, pledged, confirmed, assigned, transferred and set over . . . unto" Rainier "the whole of the vessel described as the Oil Screw GEORGEANN. . . ."[6] A failure to pay timely either principal or interest under the Note was expressly made an "events [sic] of default" under the Mortgage.[7]

In the event of default, Rainier was expressly granted the right to declare the balance of indebtedness under the Note -- principal and interest -- "due and payable immediately. . . ."[8] Rainier was also given the right to seize the GEORGEANN and sell it "in any manner permitted by law," if Baggen didn't "forthwith" pay that balance.[9] If sale proceeds were "insufficient to fully pay all expenses . . . and the principal and interest then remaining unpaid," Baggen would remain liable "for the amount of such deficiency."[10] The Mortgage expressly reflected the parties' intention that it qualify as a First Preferred Ship Mortgage under the Ship Mortgage Act of 1920.[11] Baggen does not dispute this

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[5] *Id.*

[6] *Id.* at 3.

[7] *Id.* at 11.

[8] *Id.* at 12.

[9] *Id.* at 13.

[10] *Id.* at 13-14.

[11] *Id.* at 4, 11.

Mortgage was duly perfected as a First Preferred Ship Mortgage. *See generally,* 46 U.S.C. § 922(a), (b) (statutory perfection requirements).

Like the Note, nothing in the Mortgage in any way limited Baggen's repayment obligation to a particular source of funds.

2. Purpose of the Note and Mortgage.

The Note and Mortgage were part of a written agreement between Baggen and Alaska Pulp America, Inc. (now APC),[12] for financing the GEORGEANN's construction. On August 1, 1975, Baggen Tug & Barge Co., Inc., Samson Tug & Barge Co., Inc., and APC entered into an addendum (the "August 1975 Addendum")[13] to a prior loan agreement, dated December 1, 1974 (the "December 1974 Loan Agreement"). The August 1975 Addendum was executed by George Baggen, as president of Baggen Tug & Barge and Samson Tug & Barge. The August 1975 Addendum expressly recited that APC had loaned $1,300,000 to Samson Tug & Barge Co., Inc., under the parties' December 1974 Loan Agreement, and that Samson had used those monies to "construct and outfit a new steel tugboat . . . named GEORGEANN. . . ."[14] The December 1974 Loan Agreement had expressly provided that APC's loan (originally for $1,100,000, but subject to increase as needed)

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[12] Alaska Pulp Corporation, or APC, is the successor in interest to Alaska Pulp America, Inc.

[13] Complaint, CR 1, Ex. 3.

[14] *Id.* at 1.

was to "be evidenced by a Promissory Note," and "bear interest at the rate of ten percent (10%) per annum. . . ."[15] In fact, George Baggen, as president of Samson Tug & Barge Co., Inc., executed a promissory note in that amount, "with interest thereon . . . at the rate of ten percent (10%) per annum. . . ."[16] This note, like the later August 1975 Note, provided for its "constru[ction] . . . and enforce[ment] according to the laws of the State of Washington."[17]

As of December 1974, the GEORGEANN was being built by Marine Power & Equipment Co., Inc., under specifications dated September 1, 1974. The vessel was not expected to be completed, outfitted and ready for delivery before March 31, 1975, and payments under the loan agreement were anticipated to be spread out from December 1, 1974 through March 31, 1975. Under the December 1974 Loan Agreement, upon the vessel's delivery Samson Tug & Barge Co., Inc., was to execute a First Preferred Ship Mortgage to APC's trustee, and give a new note, payable to that trustee. That is what happened, except Baggen Tug & Barge, not Samson Tug & Barge, gave the Mortgage and new note; APC agreed to change "on the condition Samson remain liable [on the $1,300,000 loan] . . .

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[15] Petitioners' Amended Answer and Counterclaim ("Amended Answer"), CR 40, Ex. B at 2.

[16] *Id.* (copy of note).

[17] *Id.*

and co-sign as a maker [of the new] . . . promissory note evidencing the [l]oan."[18]

Like the 1975 Note and Mortgage, nothing in the December 1974 Loan Agreement, the prior promissory note given under that agreement, or the August 1975 Addendum in any way limited Baggen's repayment obligation to a particular source of funds.

3. The Trust Agreement Between Rainier and APC.

Contemporaneous with the execution of the 1975 Note, Mortgage and the August 1975 Addendum, Rainier and APC executed a trust agreement ("Trust Agreement"). Neither Baggen Tug & Barge Co., Inc., nor Samson Tug & Barge Co., Inc., was a party to this agreement. The Trust Agreement expressly recited that APC had loaned Samson Tug & Barge Co., Inc., $1,300,000 under the December 1974 Loan Agreement, the 1975 Note evidenced the terms of the loan, and the Mortgage was to secure the repayment of the loan.[19]

Nowhere did the Trust Agreement expressly recite that Baggen's repayment obligation was limited to a particular source of funds.

4. Baggen's Subsequent Performance and Default.

From 1975 until 1983, Baggen made timely payments under the terms of the 1975 Note and Mortgage. In 1982,

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[18] Complaint, CR 1, Ex. 3 at 1.

[19] Appendix to Pet. at A-24 (reproduction of Trust Agreement, "Recitals" section, ¶¶ A, C).

APC terminated Baggen's towing services. Although Baggen claims to have stopped making payments on the Note when employment with APC terminated, Rainier's payment records reflect Baggen's last payment was on November 4, 1983, nearly one year after termination. When Baggen stopped making payments, Rainier's records reflected an outstanding balance of $665,241.04, and payments to that date totalling $1,606,290.66. Thus, at the time of default, Baggen had paid an amount equal to the loan principal of $1,300,000, plus over $300,000 in interest.

C. The Lower Court Proceedings.

1. Before the District Court.

On February 14, 1985, Rainier sued in admiralty, under 46 U.S.C. §§ 951 and 954(a) and 28 U.S.C. § 1333, to foreclose on the First Preferred Ship Mortgage, for an *in personam* money judgment in the event of any deficiency following a foreclosure sale, and for reasonable attorneys' fees and costs; all under the terms of the 1975 Note and Mortgage. Baggen's answer raised several affirmative defenses and counterclaims. On December 31, 1985, Rainier moved for summary judgment of foreclosure and dismissal of all defenses and counterclaims.

Baggen's opposition claimed Baggen had a prior oral "no interest" loan agreement with APC, and that Baggen had been compelled under duress to enter into a substitute written "with interest" loan; it was this supposed substitute that was reflected in the 1975 Note, Mortgage and related documents. Rainier disputed whether Baggen ever had such an oral "no interest" agreement with APC; Rainier also argued enforcing such an agreement would violate Washington State's

integrated agreement (*parol* evidence) rule and Statute of Frauds, which were invoked under the authority of the Note's choice-of-law clause.[20]

Baggen did not raise the issue now raised before this Court; Baggen only argued that Alaska, not Washington, law should apply, and that the alleged oral "no interest" agreement was enforceable under Alaska's integrated agreement rule and Statute of Frauds.[21]

On January 28, 1987, the Magistrate recommended Rainier's summary judgment motion be granted. Baggen objected, but raised no new issues. On April 1, 1987, the Magistrate reaffirmed his recommendation. On March 30, 1988, the District Court (Hon. Andrew J. Kleinfeld) accepted the Magistrate's recommendations, and entered an order granting Rainier's motion.

On July 7, 1988, the District Court entered a judgment decreeing foreclosure. On August 3, 1988, the court entered an order on that judgment directing the

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[20] Rainier also challenged the appropriateness of permitting Baggen to pursue its claims against APC, without joining APC as a party. *See, e.g.*, Restatement (Second) of Trusts § 329 (trial court may refuse to permit defendant to use claims against the beneficiary as a setoff against trustee's claims, to avoid "circuity of action").

[21] The Petition claims Baggen "maintained that its maritime contract with APC was valid and enforceable under *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919)," but that the trial court nonetheless dismissed Baggen's claims, implying Baggen did raise the issue now raised before this Court. *See* Pet. at 7. In fact, Baggen did not raise before the district court the alleged conflict between general federal maritime law and Washington law now raised before this Court; Baggen did not even cite *Kossick* or *Union Fish Company* until its reply brief before the court of appeals.

GEORGEANN be sold, which it subsequently was. Baggen took no appeal within thirty days of either the decree or sale order; instead, Baggen waited until August 10, 1990, following entry of the district court's *in personam* money deficiency judgment on July 19, 1990, before filing a notice of appeal. Baggen's appeal, however, did not challenge the sale procedure or the adequacy of the sale price; Baggen sought only to vacate the summary judgment dismissal of Baggen's defenses and counterclaims, granted to Rainier under the decree of foreclosure and order of sale.

2. Before the Court of Appeals.

Baggen's opening brief did not raise the issues now raised before this Court; instead, Baggen continued to argue for Alaska law, and for the enforceability of the alleged prior oral "no interest" agreement under Alaska's integrated agreement rule and Statute of Frauds. Although Baggen's reply brief (for the first time in this case) argued that contrary state law may not displace general federal maritime law, Baggen still did not claim that Washington's integrated agreement rule was contrary to general federal maritime law; Baggen only asserted that Washington's Statute of Frauds was contrary to general federal maritime law, and therefore inapplicable to the alleged oral "no interest" agreement.[22]

On April 29, 1992, the Court of Appeals affirmed the District Court's summary judgment in an unpublished, *per curiam* memorandum order, subsequently reported at 962

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[22] Also for the first time, Baggen's reply brief cited this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919).

F.2d 14 (1992) (table). Rainier had challenged jurisdiction, arguing Baggen's failure to appeal within thirty days of the 1988 decree and sale order rendered Baggen's appeal untimely; the Ninth Circuit held Baggen's appeal timely, and affirmed on the merits. Baggen moved for reconsideration and suggested rehearing *en banc*. For the first time in this case, Baggen now argued Washington's integrated agreement rule was contrary to general federal maritime law.

The Ninth Circuit panel denied reconsideration. No active judge of the court having requested a vote on the suggestion of rehearing *en banc*, an order denying reconsideration and rehearing *en banc* was entered June 29, 1992.

II.
ARGUMENT

A. The Petition Presents No Important Question of General Federal Maritime Law Requiring This Court's Review.

Petitioners claim the Ninth Circuit's decision conflicts with this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) ("*Kossick*") and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919) ("*Union Fish*"). There is no conflict, for the following three reasons.

1. The Ninth Circuit Properly Enforced an Express Contractual Choice of Law.

Kossick and *Union Fish* involved attempts by vessel owners to use state Statutes of Frauds to avoid obligations under oral contracts with their seamen; this Court held such

statutes could not be used in that fashion. In *Kossick*, this Court held the New York Statute of Frauds could not defeat an oral agreement between a seaman and his employer, under which the employer would "assume responsibility for all consequences of improper or inadequate treatment" provided by a public hospital for a thyroid condition related to service on the employer's vessel. *See* 365 U.S. at 732-34. In *Union Fish*, this Court held the California Statute of Frauds could not defeat an oral agreement, under which an employer hired a party to serve as master of a vessel. *See* 248 U.S. at 311-12. Neither case, however, involved the application of a state integrated agreement rule, expressly and freely chosen by parties to a written contract, to refuse enforcement of an oral agreement collateral to the written contract.

It is a well established that parties may contract for the application of a particular state's law, *see, e.g.*, Restatement (Second) of Conflict of Laws § 187, and this principle has been applied to First Preferred Ship Mortgages. *See, e.g., Dietrich v. Key Bank, N.A.*, 693 F. Supp. 1112, 1115-16 (S.D. Fla. 1988); *see generally* S. Friedell, 2 *Benedict on Admiralty* § 70f at 6-63 & n.102, 6-64 & n.103 (6th ed. 1992) (discussing *Dietrich* and related cases). Baggen gave a note expressly providing for its "construc[tion] . . . and enforce[ment] according to the laws of the State of Washington," and the Ninth Circuit merely enforced that choice when it applied Washington's integrated agreement rule to defeat Baggen's collateral oral agreement

claim.[23] Nothing in *Kossick* or *United Fruit* suggests general federal maritime law is hostile to enforcing such contractual choices, particularly in a commercial transaction involving a written promissory note.[24]

2. The Ninth Circuit Properly Applied a State Law Rule That Is Consistent with the Comparable General Federal Maritime Rule.

Kossick and *United Fruit* involved an actual conflict between state law and general federal maritime law; there is no such conflict here. Baggen is attempting to avoid fulfilling a written unqualified promise to pay by proving -- through extrinsic (*parol*) evidence -- that in fact the promise was qualified, by the limitation that it need be met only through funds from a particular source (specifically, towing fees paid by APC for services rendered by Baggen using the GEORGEANN). It is hornbook law that such claims are barred by the integrated agreement rule, *e.g.*, J. Wigmore, 9 *Wigmore on Evidence* § 2444 (Chadbourn rev. 1981) at 148-49 (footnotes omitted), and Washington State courts have

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[23] Baggen cites with approval the Ninth Circuit's statement of the integrated agreement rule in *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493 (9th Cir. 1988). *See* Pet. at 14. Yet, in *Kemp Fisheries* the Ninth Circuit enforced a choice of California law in a vessel charter agreement, and applied California's integrated agreement rule to defeat oral warranty and related claims outside the written charter agreement. *See* 852 F.2d at 495-96 (reversing district court).

[24] Although Rainier's discussion will focus on the integrated agreement rule, principally because it constitutes sufficient grounds for the Ninth Circuit's decision, Rainier believes that Washington's Statute of Frauds was also a correct basis for that decision, as the application of that statute (like Washington's integrated agreement rule) was the result of an express contractual choice.

repeatedly adhered to this well established principle. *See Meyer v. Armstrong*, 49 Wash. 2d 598, 304 P.2d 710, 711-12 (1956) (reversing judgment based on alleged oral agreement qualifying obligation to pay note by making it payable "only out of the selling price of [a] . . . mine or from the profits of its operation"); *Whitman Realty & Inv. Co. v. Day*, 161 Wash. 72, 296 P. 171, 172 (1931) (affirming dismissal of defense to note based on alleged oral agreement making note payable only "from dividends to be declared on [maker's] . . . stock," "sale of . . . [certain] securities," or "portion" of raise in salary); *Bank of California v. Starrett*, 110 Wash. 231, 188 P. 410, 411 (1920) (affirming refusal to entertain defense to note based on alleged oral agreement making note payable only from sale of the "pack" of a salmon packing business).

Baggen's claim thus flew in the face of a venerable *parol* evidence bar; the Ninth Circuit's decision did nothing more than enforce that rule. *See* Pet. at App. A-7 (Ninth Circuit Decision). Federal maritime law is not in conflict with such a result, as maritime contracts are subject to general principles of contract law, and admiralty recognizes the validity of the integrated agreement rule. *See, e.g.*, T. Schoenbaum, *Admiralty and Maritime Law* § 10-2 at 385 (3d ed. 1987) ("the federal maritime law includes general principles of contract law") (footnote omitted)); *Har-Win, Inc. v. Consolidated Grain & Barge Co.*, 794 F.2d 985, 987 (5th Cir. 1986) (federal admiralty law recognizes and enforces the integrated agreement rule). Nothing in *Kossick* or *United Fruit* suggests general federal maritime law should

now be construed to depart from these venerable contract law principles.

3. The Ninth Circuit Decision Does Not Concern a Contract Traditionally Within the Jurisdiction of the Admiralty Courts.

Kossick and *United Fruit* involved oral maritime contracts. Baggen's petition apparently assumes the Note and Mortgage, under which Rainier initiated this foreclosure proceeding, also constitute a maritime contract. Baggen is wrong; since this Court's decision in *People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1858), contracts to build ships and related engagements have been held not to be maritime contracts. *See* S. Friedell, 1 *Benedict on Admiralty* § 186 at 12-30 (6th ed. 1992) (footnotes omitted) (citing and discussing *People's Ferry Co.* and progeny). In fact, the Ship Mortgage Act of 1920 was passed to remedy the debilitating effect of the *People's Ferry Company* doctrine on ship construction financing, by creating admiralty jurisdiction over foreclosures on mortgages that satisfied certain statutory requirements. *See Detroit Trust Co. v. Steamer THOMAS BARLUM*, 293 U.S. 21, 38-40 (1934); *see generally* S. Friedell, 2 *Benedict on Admiralty* § 69b at 6-21 through 6-23 (6th ed. 1992) (discussing the origins and purposes of the Act).

There is an undoubted federal interest in uniform administration of the Ship Mortgage Act. *See J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR*, 457 F.2d 815, 817-18 (5th Cir.) (*en banc*), *cert. denied*, 409 U.S. 948 (1972). But that is a limited interest concerned principally with foreclosure procedure, and it should not

preclude parties to a First Preferred Ship Mortgage from contracting for the application of state law. The fact remains that First Preferred Ship Mortgages are not maritime contracts; state law therefore must be at least a principal source of the substantive rights of the parties to such arrangements, and this Court has repeatedly held admiralty courts should endeavor to determine issues in accordance with substantive state law, when admiralty is invoked to protect rights rooted in such law. *See, e.g., The TUNGUS v. Skovgaard*, 358 U.S. 588, 593 (1959) (citation omitted). In short, a decision to refuse enforcement of an oral agreement collateral to a First Preferred Ship Mortgage, because that agreement violates the integrated agreement rule of the state whose law the parties contractually selected, raises no issue under *Kossick* or *Union Fish*.

B. The Petition Does Not Properly Present the Issues Petitioners Ask This Court to Review.

Even if this Court were persuaded the issues Baggen raises are of the sort that might warrant this Court's review, the Petition should still be denied because it does not properly present those issues, for the following three reasons.

1. Petitioners Did Not Timely Raise the Issues They Now Raise Before This Court.

Baggen did not raise any form of its "conflicts with admiralty law" theory until its reply brief in the Ninth Circuit, and did not raise its present "integrated agreement rule conflicts with admiralty law" theory until its petition for rehearing and suggestion of rehearing *en banc*. Contrary to its present advocacy of a general federal maritime rule governing disposition of all collateral agreement claims in

admiralty, Baggen argued before the District Court for the application of Alaska's integrated agreement and Statute of Frauds law, evidently because Baggen believed it would prevail under that law.

Baggen's failure to raise any form of its present theory until the last phases of the court of appeals proceeding should foreclose review by this Court. Choice-of-law claims must be raised before the district court, if they are to be considered on appeal. *E.g., Babb v. Schmidt*, 496 F.2d 957, 960 (9th Cir. 1974). Grounds for reversing a judgment that are raised for the first time in a reply brief come too late for consideration. *E.g., Palmer v. Reconstruction Finance Corp.*, 164 F.2d 466, 468 (2d Cir. 1947) (op. per L. Hand, judge), *cert. denied sub nom. New York, N.H. & H.R. Co. v. RFC*, 334 U.S. 811 (1948). Grounds raised for the first time in a petition for rehearing are even more untimely. *See, e.g., U.S. v. Klotz*, 503 F.2d 1056 (8th Cir. 1974) (*per curiam*)) (failure to raise an issue until a petition for rehearing wrongfully deprives the opposing party of a right to reply); *Carr v. FTC*, 302 F.2d 688, 692 (1st Cir. 1962) ("vital" issues may not be raised for first time in a petition for rehearing) (both denying rehearing petitions). This Court will not consider issues that were not properly raised in the lower courts. *See, e.g., California v. Taylor*, 353 U.S. 553, 556 n.2 (1957). Because Baggen did not raise its present theory for relief until the petition for rehearing in the court of appeals, Baggen has not satisfied this Court's requirements for review of the issues raised by Baggen's petition for a writ of certiorari.

2. Petitioners' Present Theory Is Precluded by Its Proof Offered Below in Support of an Alternative and Factually Inconsistent Theory.

As stated, Baggen raised several affirmative defenses and counterclaims. One was the present claim that Baggen and APC had an oral "no interest" agreement that limited Baggen's repayment obligation to towing fees that APC paid Baggen. Alternatively, Baggen alleged that APC forced Baggen under duress to give up its oral "no interest" loan deal for the "with interest" written loan embodied in the Note, Mortgage and related instruments.

In the district court, Baggen elected to prove the duress claim; George Baggen, petitioners' president, testified APC took advantage of the companies' financial vulnerability, and compelled them under duress to consent to substituting the "with interest" agreement for the prior "no interest" deal.[25] Baggen's duress claim is a familiar one: a threat to breach a contract to force agreement to a substitute. *See generally* Anno., *Threat to Break a Contract as Duress*, 70 L. Ed. 822 (1926). Baggen, however, could not show the absence of an adequate legal remedy for the threatened breach, which is essential to establish this sort of duress claim. *See, e.g., Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) (op. per L. Hand, Judge). The district court and the Ninth Circuit rejected Baggen's duress claim, and it has been abandoned before this Court.

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[25] Affidavit of George Baggen, CR 78 at 7-8.

Baggen, however, cannot undo the consequences of its evidentiary election in the lower courts. *See, e.g., Baltimore & Ohio R.R. Co. v. Alpha Portland Cement Co.*, 218 F.2d 207, 211 (3d Cir. 1955) (a party cannot "shift" its evidentiary position, once taken before the district court); *see also U.S. for Use and Benefit of General Dynamics Corp. v. Home Indemnity Co.*, 489 F.2d 1004, 1007-08 (7th Cir. 1975) (criticizing attempt by party to "repudiate the evidentiary effects of letters and statements" introduced by that party at trial).[26] Baggen submitted evidence that it acquiesced in the substitution of the written "with interest" loan for the oral "without interest" one, and that evidence waives the factual predicate for Baggen's present claim that the parties entered into the First Preferred Ship Mortgage relationship with a continuing collateral arrangement that limited Baggen's obligation to pay to a specific source of funds. Without that factual predicate, Baggen's petition does not present a cognizable case or controversy raising the general federal maritime law issues which Baggen asks this Court to review.

3. Petitioner Did Not Timely Appeal From the Decree and Order of Sale.

As stated, Baggen filed its Notice of Appeal from the trial court's July 19, 1990, *in personam* money judgment. Baggen's quarrel, however, was not with that judgment; Baggen neither challenged the sale procedure, nor claimed it

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[26] Rainier urged this ground for affirmance below, and therefore it is properly before this Court. *E.g., Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (citations omitted).

produced an inadequate price. What Baggen seeks is reversal of the trial court's July 7, 1988 judgment decreeing foreclosure and dismissing Baggen's defenses and counterclaims.

Since Chief Justice Marshall's opinion for the Court in *Ray v. Law*, 7 U.S. (3 Cranch) 179 (1805), foreclosures and related orders of sale have been held final and appealable immediately upon entry. *See, e.g., Citibank, N.A. v. Data Lease Financial Corporation*, 645 F.2d 333, 337-38 (5th Cir. 1981) (citing *First National Bank v. Shedd*, 121 U.S. 74 (1887); *Sage v. Central R.R.*, 93 U.S. 412 (1876); *Bronson v. LaCrosse & M.R.R.*, 67 U.S. (2 Black) 524 (1863); *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6 (1839)). Accordingly, Baggen could have taken an appeal no later than thirty days after entry of the August 3, 1988 order directing sale; Baggen's failure to do so precludes Baggen from now challenging the validity of the foreclosure decree dismissal of Baggen's defenses and counterclaims. *See, e.g., Data Leasing*, 645 F.2d at 337-38.[27] As Baggen sought no relief on appeal besides vacation of the foreclosure decree judgment, Baggen's appeal should have been dismissed for failure to comply with the jurisdictional requirements of Federal Rule of Appellate Procedure 4(a), *see, e.g., Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978), and Baggen's petition therefore also fails to timely present the issues it asks this Court to review.

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[27] Rainier also urged this ground for affirmance below and therefore it is properly before this Court, even though the Ninth Circuit ruled Baggen's appeal timely. *E.g., Blum v. Bacon*, 457 U.S. at 137 n.5 (citations omitted).

III.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.[28]

RESPECTFULLY SUBMITTED,

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[28] Rainier has been awarded attorney fees in the District Court and the Ninth Circuit, under a fees clause in the Note. It is Rainier's understanding, based on a review of the rules, leading secondary authorities and a discussion with the Clerk of this Court, that an application for an award of fees incurred in opposing Baggen's petition should be made to the Ninth Circuit.

Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

No. 92-565

In The

Supreme Court of the United States

October Term, 1992

BAGGEN TUG & BARGE CO., INC., and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' REPLY TO RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. The Petition Presents Important Questions Requiring Review 2

A. The Note and Vessel Hire Agreements are not Integrated 2

B. The Vessel Hire Agreement is Consistent with the Note 3

C. The Vessel Hire Agreement is Subject to Admiralty Jurisdiction 5

II. The Admiralty Issues Presented in this Petition for Writ of Certiorari Were Properly Presented Below 5

III. Petitioners' Claims are not Precluded by any Alternative Theories 7

IV. Samson's Appeal Following Entry of Final Judgment Is Timely As to All Prior Orders... 9

V. Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc., 776 F.2d 1414 (9th Cir. 1985) 10

Kossick v. United Fruit Co., 365 U.S. 731 (1961) ... 2, 5, 7

Union Fish Co. v. Erickson, 248 U.S. 308 (1919) 2, 5

OTHER AUTHORITIES

F.R.C.P., Rule 54(b) 9

Restatement (Second) of Agency § 371 4

Restatement (Second) of Trusts § 329 4

Restatement (Second) Conflict of Laws § 188 6

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Baggen Tug & Barge Co., Inc. and Samson Tug & Barge Co., Inc., Petitioners herein (hereinafter referred to as "Samson"), file this reply brief in order to correct, fairly state and analyze important issues of law and fact raised in Respondent Rainier National Bank's Brief in Opposition.

ARGUMENT

I. The Petition Presents Important Questions Requiring Review

A. The Note and Vessel Hire Agreements are not Integrated.

Rainier National Bank (hereinafter "Rainier") says that the Ninth Circuit's decision does not conflict with this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919), recognizing the validity of oral maritime contracts like Samson's vessel hire contract with Alaska Pulp Corp. (hereinafter APC) Rainier makes three arguments which will be discussed below:

> "1. The Ninth Circuit properly enforced an express contractual choice of law;"

Respondent's Brief at 11-16.

Rainier argues that the parties freely contracted for application of a particular state's law. Here, however, the only choice of laws provision is found in a promissory note between Samson and Rainier. This provision required that the note be construed and enforced according to the laws of the State of Washington. There is no evidence or basis in the record to argue that Samson expressly and freely chose to apply the law of the State of Washington to an entirely separate oral maritime contract it enjoyed with Rainier's beneficiary, APC. To the contrary, Rainier's Trust Agreement with its beneficiary APC, expressly recognized other agreements between Samson and APC and excluded them from the trust estate:

> 1.11 The Trustee has been notified that there may have been other and previous dealings between the Debtor, other parties, and/or [APC]. It is understood and agreed that the trust estate shall be limited to the Note of Debtor and Samson and the First Preferred Ship Mortgage on the Vessel; and any rights granted, or duties imposed, by any other agreements to which Debtor may be a party shall be excluded from the trust.

Pet. App. 29, Trust Agreement.

Critically, neither the Ninth Circuit nor Rainier in its brief in its opposition to this Petition for Writ of Certiorari advance a single argument explaining why this Trust Agreement provision should be disregarded. By this Trust Agreement, Rainier specifically contracted that Samson's other agreements with APC would be excluded from Rainier's responsibilities, which would be limited to the note of the debtor and the first preferred ship's mortgage. A choice of laws provision contained within the note of the debtor cannot, therefore, extend to Samson's other oral contracts with Rainier's beneficiary APC.

B. The Vessel Hire Agreement is Consistent with the Note.

> "2. The Ninth Circuit properly applied a State law rule that is consistent with the comparable general federal maritime law;"

Respondent's Brief at 11-16.

Rainier's second argument that "the Ninth Circuit properly applied a State law rule that is consistent with the comparable general federal maritime rule" misstates

Samson's position below and in its Petition for Writ of Certiorari. Rainier argues:

> [B]aggen is attempting to avoid fulfilling a written unqualified promise to pay by proving – through extrinsic (*parol*) evidence – that in fact the promise was qualified, by the limitation that it need be met only through funds from a particular source (specifically, towing fees paid by APC for services rendered by Baggen using the GEORGEANN). It is hornbook law that such claims are barred by the integrated agreement rule. . . .

Respondent's Brief at 13.

Samson does not seek to vary or contradict the terms of the written contract between Samson and Rainier. Samson seeks only to enforce through setoff its claims against the trustee Rainier's beneficiary APC. The law clearly allows this result under the *Restatement (Second) of Agency* § 371 and *Restatement (Second) of Trusts* § 329.

Samson is entitled to setoff against the trustee's and agent's claims the damages Samson has suffered by virtue of its beneficiary and principal's breach of a separate oral maritime contract to profitably employ the vessel Samson constructed. This remedy of setoff is particularly appropriate as APC made two contracts with Samson: (1) an oral agreement to employ a vessel, and (2) a loan agreement through a trustee. It is unfair for APC through its trustee to fully collect the construction loan while avoiding its obligations under the oral maritime contract to employ the vessel constructed. The decision below has allowed this result.

C. The Vessel Hire Agreement is Subject to Admiralty Jurisdiction.

> "3. The Ninth Circuit decision does not concern a contract traditionally within the jurisdiction of the admiralty courts."

Respondent's Brief at 11-16.

Rainier defines the "contract" as the note and preferred marine mortgage. The contract Samson seeks to enforce, however, is the oral contract for hire of a vessel. This contract is certainly traditionally within the jurisdiction of admiralty courts and will be recognized and enforced notwithstanding its oral nature. *Kossick*, 365 U.S. 731, and *Union Fish Co.*, 248 U.S. 308. The obligations in the written financing contract have been performed or reduced to judgment. Samson remains, however, entitled to setoff damages it has suffered by reason of APC's breach of its oral contract to hire the O/S GEORGEANN under the principles of the *Union Fish Co.* and *Kossick* decisions which protect and enforce rights flowing from oral maritime contracts.

II. The Admiralty Issues Presented in this Petition for Writ of Certiorari Were Properly Presented Below.

Rainier argues that the principal admiralty issues raised by this Petition for Writ of Certiorari, i.e., the enforceability of oral maritime contracts notwithstanding contrary state law, were not fully presented below. Rainier is incorrect.

It is true that Samson initially urged that Alaska State law would apply to the oral contract between Samson

and APC under the test set out in the *Restatement (Second) Conflict of Laws* § 188. Rainier, however, raised in its appellee's brief before the Ninth Circuit the notion that admiralty law would apply to Samson's claims:

> Baggen's conflicts of law exercise ignores this policy. While the system of admiralty may be "incomplete and less than perfect," *id.*, the issues raised by Baggen's defenses and counterclaims do not fall within the system's gaps . . . Admiralty has its own integrated agreement (parol evidence rule). *See, e.g., Har-Win, Inc. v. Consolidated Grain & Barge Co.*, 794 F.2d 985, 987 (5th Cir. 1986). Admiralty may be more willing to enforce oral agreements than some jurisdictions with a Statute of Frauds. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 734, n.4 (1961). In short, admiralty has rules governing the substantive validity of Baggen's defenses and counterclaims. . . .

Brief of Appellee Rainier National Bank before the Ninth Circuit at 25.

In its reply brief filed before the Ninth Circuit, Samson concurred:

> To the extent that the Samson/APC agreement constitutes a contract for hire of a vessel, it's maritime nature may lead this court to apply the law of admiralty. [cit.om.] If this is done, the agreement for hire, although oral, is fully enforceable.
>
> Under the law of admiralty, this oral contract would be enforceable in the face of a state Statute of Frauds. *Mayer Bolt Works, Inc. v. Bright Marine Basin, Inc.*, 265 F.Supp. 352 (E.D.N.Y. 1966), *Union Fish Co. v. Erickson*, 248 U.S. 308

(1919). In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the Supreme Court held:

> "For it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law."

Reply Brief of Appellants before the Ninth Circuit at 14-15.

Rainier argued below that admiralty law, including *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), would apply to Samson's contract claims were it not for the choice of laws provision contained in Samson's promissory note. Thus, both Rainier and Samson agreed below that federal admiralty law would ordinarily apply to the oral contract Samson had with APC. Rainier went on to argue, as it does here, that because the parties chose to adopt Washington State law in the Rainier/Samson note they adopted Washington State law for construction and enforcement of the Samson/APC vessel hire agreement. As shown above, however, this choice of laws provision applies only to the promissory note and has no application to the oral contract between Samson and APC for the hire of the vessel. The admiralty arguments presented by this Petition for Writ of Certiorari were properly raised below.

III. Petitioners' Claims Are Not Precluded by Any Alternative Theories.

Samson established below factual evidence that its original agreement with APC obligated APC to finance construction of the O/S GEORGEANN pursuant to a no interest loan. Samson's evidence included the affidavit of

Doug Theno, APC's Logging Manager, that no interest loans to contractors were a customary business practice of the Japanese firm and that he, in fact, agreed to provide Samson with a no interest loan for tug construction. (Pet. App. 21, 22, 23.) Samson's President George Baggen confirms this original agreement and a subsequent modification wherein the loan would bear interest at ten percent. (Pet. App. 36, 37, 38.)

Samson has argued unsuccessfully that the change from a no interest loan to a ten percent loan was accomplished through duress, as it occurred after Samson had commenced to construct an expensive vessel. Samson has not sought further review on this particular issue. Rainier argues in its brief opposing Samson's Petition for Certiorari that Samson's evidence of duress relative to the terms of vessel financing prevents Samson from seeking enforcement of the agreement to employ the O/S GEORGEANN:

> [B]aggen submitted evidence that it acquiesced in the substitution of the written "with interest" loan for the oral "without interest" one, and that evidence waives the factual predicate for Baggen's present claim that the parties entered into the First Preferred Ship Mortgage relationship with a continuing collateral arrangement that limited Baggen's obligation to pay to a specific source of funds.

Rainier's Brief In Opposition at 19.

This argument again misstates Samson's position, as Samson seeks not to vary the written note by engrafting a source of payment provision, but rather to obtain a setoff for damages flowing from APC's breach of its oral maritime contract to hire Samson's vessel. Samson has stated this

position so often and so clearly that Rainier's continued misstatement of Samson's position now appears calculated.[1]

IV. Samson's Appeal Following Entry of Final Judgment Is Timely As to All Prior Orders.

In the absence of an express determination and certification of final judgment pursuant to Rule 54(b), F.R.C.P.,

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[1] In its opening brief before the Ninth Circuit, Samson argued:

> Samson's proof of its oral contract with APC does not violate the Parol Evidence Rule. . . . Contract claims of Samson relate to breach of APC's promise to provide work at rates sufficient to cover operating costs, repay debt, and net a profit. Evidence supporting these claims does not vary or contradict a loan agreement which, pursuant to its trust terms, specifically excludes such "other and previous dealings between the debtor, other parties, and/or [APC]."

Id. at 28.

In its Reply Brief filed at the Ninth Circuit, Samson stated:

> Thus, even if Rainier is allowed to enforce the note as written, Samson still has a contract claim against APC based on APC's failure to utilize Samson's vessels at levels and rates sufficient to cover expenses, debt and net a profit. This claim includes as damages any sums held due Rainier and may be setoff against Rainier.

Id. at 13, 14.

Identical arguments were set out in Samson's Petition for Writ of Certiorari at pages 13 and 14. Samson has consistently asserted a right to setoff damages occasioned by APC's breach of the oral maritime contract to hire a vessel notwithstanding Rainier's full enforcement of the promissory note as written.

Petitioners may raise and determine in this appeal all orders preceding final judgment. *Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc.*, 776 F.2d 1414 (9th Cir. 1985). As the Ninth Circuit recognized, Samson does not seek to set aside the foreclosure sale of the O/S GEORGEANN, but rather to challenge the resulting deficiency judgment and assert a setoff. (Pet. App. A-5.) Samson filed a timely appeal to the final judgment entered herein. (Pet. App. A-9-A-11.)

V. Conclusion.

Samson's Petition for Writ of Certiorari raises the substantial issues of ensuring the enforcement of oral maritime contracts and ensuring that this Court's decisions are followed. For these reasons, the Writ of Certiorari should issue.

Respectfully submitted,

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